



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Bill of Rights and Voting Committee Report



Issued July 1, 2017

Cover photo shows two women before a board indicating results for the 1968 Ohio Democratic primary for the U.S. Senate. Courtesy of the Ohio History Connection (MSS388AV_B01F05_001).

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OCMC Concluding Reports Series

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Report of the Constitutional Revision and Updating Committee

Report of the Education, Public Institutions, and Local Government Committee

Report of the Finance, Taxation, and Economic Development Committee

Report of the Judicial Branch and Administration of Justice Committee

Report of the Legislative Branch and Executive Branch Committee

Letter from the Chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

June 23, 2017

Senator Charleta B. Tavares, Co-chair
Senate Building
1 Capitol Square, 2nd Floor
Columbus, Ohio 43215

Representative Jonathan Dever, Co-chair
Riffe Center for Government and the Arts
77 South High Street
13th Floor
Columbus, Ohio 43215

Dear Co-chairs Tavares and Dever,

On behalf of the Bill of Rights and Voting Committee, I present the committee's final report. The committee's charge was to review the provisions of Article I (Bill of Rights) of the Ohio Constitution dealing with the rights of all, as well as provisions in Article V and Article XVII dealing with voting rights and elections.

Because our committee was assigned sections touching on the most essential and basic rights of citizens, it was perhaps inevitable that our discussions would be time-consuming and, sometimes, fail to result in agreement. Nevertheless, we did find consensus in many cases, and successfully issued reports and recommendations for numerous sections of Article I, as well as for three sections of Article V.

A good deal of time was spent trying to reach agreement on how to modernize Article V, Section 6, which, in outdated and offensive language dating from 1851, describes persons with diminished mental capacity as "idiots" and "insane persons" before prescribing that they be disenfranchised. After finally hammering out a compromise replacement for the provision, the committee issued a report and recommendation that failed to achieve the requisite support of the Commission. As I indicated in our last Commission meeting, the fact that this language remains in our constitution – when nearly every state that had similar language has been able to act to remove it – is a blight on the Commission's otherwise good record. I urge you and your fellow

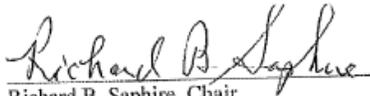
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legislators to take action to remove this language, as it has no place in our foundational document.

Our committee, while not always united in opinion, was united in the dedication and seriousness with which we addressed our charge. I am glad for the opportunity to have worked with these fine individuals throughout this process. I only wish we could have had the time to address the remaining sections we were assigned.

I appreciate the opportunity to present this report on behalf of the committee.

Very truly yours,



Richard B. Saphire, Chair
Bill of Rights and Voting Committee

Enclosure

I. Introduction

This Report of the Bill of Rights and Voting Committee (“BRV Committee”) is issued pursuant to the conclusion of the work of the Ohio Constitutional Modernization Commission (“Commission”). It contains a summary of the committee’s organization and work products, including topics discussed and all recommendations made to the Commission.

The Commission was established in 2011 by enactment of Am. House Bill 188 by the 129th Ohio General Assembly. The Commission was charged with:

- Studying the Ohio Constitution;
- Promoting an exchange of experiences and suggestions respecting desired changes in the constitution;
- Considering the problems pertaining to the amendment of the constitution;
- Making recommendations from time to time to the General Assembly for the amendment of the constitution.

The Commission used six subject matter committees for the purpose of reviewing constitutional provisions: Education, Public Institutions, and Local Government Committee; Finance, Taxation, and Economic Development Committee; Judicial Branch and Administration of Justice Committee; Bill of Rights and Voting Committee; Constitutional Revision and Updating Committee; and Legislative Branch and Executive Branch Committee. There is a separate report for each committee providing a summary of its work and recommendations to the Commission.

The BRV Committee was assigned the responsibility of reviewing the following sections of the Ohio Constitution:

- Article I (Bill of Rights)
 - Sections 1, 2, 3, 4, 6, 7, 11, 13, 17, 18, 19, 19b, 20, and 21 only
- Article V (Elective Franchise)
- Article XVII (Elections)

In addition, all committees could be assigned to review other issues or proposed constitutional amendments as needed by the Coordinating Committee or the Commission.

II. Membership of the Committee

Under Rule 6.2, each member of the Commission was assigned to serve on two subject matter committees. In total, ten members were appointed to the Bill of Rights and Voting Committee.

The following individuals were serving on the BRV Committee in June 2017:

- Richard B. Saphire Chair
- Jeff Jacobson Vice-chair
- Karla L. Bell
- Rep. Kathleen Clyde
- Douglas R. Cole
- Rep. Jonathan Dever
- Justice Patrick F. Fischer
- Edward L. Gilbert
- Sen. Bob Peterson
- Sen. Michael Skindell

Bill of Rights and Voting Committee Meeting



III. Summary of Recommendations

In total, the BRV Committee made ten recommendations to the Commission. Table 1 summarizes the recommendations including when they were made and the Commission's action.

Under Rules 8.3 and 9.4 of the Commission Rules of Procedure and Conduct, a committee recommendation for no change to the Constitution required consideration at one scheduled meeting and a majority vote in favor, while a recommendation for change required consideration at two meetings and a vote in favor by a majority of the committee members. Following a favorable vote, a recommendation was forwarded to the Coordinating Committee to review the recommendation as to form. After Coordinating Committee approval, the recommendation was then sent to the Commission co-chairs to place on the Commission agenda.

Each recommendation was the subject of a separate report containing the background and discussion regarding the affected constitutional provisions. The separate report for each recommendation is available in Appendix 1.

In some cases, constitutional sections were the subject of discussion by the committee but no recommendation was made. In other cases, there were constitutional sections assigned to the committee that were not able to be discussed before the closure of the Commission. Appendix 3 contains a status summary of all sections assigned to the committee, including those which did not progress to the Commission.

Table 1: Bill of Rights and Voting Committee Recommendations

| Constitutional provision | Topic | Recommendation | Committee approval | Commission action | Vote |
|--------------------------|--|----------------|--------------------|-----------------------------|-----------------------------|
| Art. I, § 2 | Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges | Retain | Feb. 12, 2015 | Adopted June 11, 2015 | 22-0 |
| Art. I, § 3 | Right to Assemble | Retain | Feb. 12, 2015 | Adopted June 11, 2015 | 22-0 |
| Art. I, § 4 | Bearing Arms, Standing Armies, and Military Power | Retain | Feb. 12, 2015 | Adopted June 11, 2015 | 22-0 |
| Art. I, § 13 | Quartering Troops | Retain | June 11, 2015 | Adopted Oct. 8, 2015 | 23-0 |
| Art. I, § 17 | No Hereditary Privileges | Retain | June 11, 2015 | Adopted Oct. 8, 2015 | 23-0 |
| Art. I, § 20 | Powers Reserved to the People | Retain | Nov. 12, 2015 | Adopted Jan. 14, 2016 | 22-0 |
| Art. V, § 2 | Election by Ballot | Retain | May 11, 2017 | Adopted May 11, 2017 | 21-0-1 |
| Art. V, § 2a | Names of Candidates on Ballot | Retain | Mar. 9, 2017 | Adopted Apr. 13, 2017 | 25-0 |
| Art. V, § 4 | Exclusion from Franchise for Felony Conviction | Retain | Nov. 12, 2015 | Adopted Jan. 14, 2016 | 20-2 |
| Art. V, § 6 | Mental Capacity to Vote | Revise | Mar. 11, 2016 | Not adopted May 12, 2016 | 18-8 (22 votes required) |

IV. Summary Proceedings of the Bill of Rights and Voting Committee

NOTE: The full record of committee minutes is presented in Appendix 2.

2013-2014

During this biennium, the Bill of Rights and Voting Committee reviewed Article I, Sections 2, 3, 4, 6, 7, 13, 17, and 20, as well as Article V, Sections 2, 2a, 4, 6, 7, 8, and 9. This review resulted in a preliminary consensus to retain Article I, Section 2 (Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges), Section 3 (Right to Assemble), Section 4 (Right to Bear Arms), Section 6 (Slavery and Involuntary Servitude), Section 13 (Quartering Troops), Section 17 (No Hereditary Privileges), and Section 20 (Powers Reserved to the People).

With regard to Article V, the committee addressed Sections 2 (Elections by Ballot), 2a (Names of Candidates on Ballot), and 7 (Primary Elections), preliminarily agreeing that Sections 2 and 2a should be retained in their current form. The committee deferred discussion of Section 7 to a future meeting. Although the committee began to review Sections 8 and 9, those sections ultimately were transferred to the Legislative Branch and Executive Branch Committee for consideration. The committee also began a review of Article V, Section 4, relating to the disenfranchisement of persons convicted of felony crimes, and Section 6, relating to the disenfranchisement of “idiots” or “insane persons.”

Speakers who appeared before the committee included Rep. Alicia Reece, President of the Ohio Legislative Black Caucus, who advocated for adoption of a Voter’s Bill of Rights; Professor Edward B. Foley of the Moritz College of Law at The Ohio State University, who presented on the virtues and problems associated with the constitutionalization of voting rights and the administration of voting systems; Political Science Professor John Dinan of Wake Forest University’s Department of Politics and International Affairs, who discussed voting rights and election law; Professor Douglas A. Berman, of the Moritz College of Law at the Ohio State University, who presented on the topic of felon disenfranchisement; and Michael Kirkman, Executive Director of Ohio Disability Rights Law and Policy Center (Disability Rights Ohio), who spoke regarding voting rights for the mentally impaired.

Reports and Recommendations

In December 2014, the committee was presented with Reports and Recommendations related to the committee’s desire to retain Article I, Sections 2, 3, and 4 in their present form, and held a first hearing in preparation for approving the Reports and Recommendations and passing them along for review by the full Commission.

2015-2016

The Bill of Rights and Voting Committee spent much of 2015 considering what changes to recommend to Article V, Section 6, which addresses the disenfranchisement of mentally incapacitated individuals. While members of the committee agreed that the provision’s current description of such persons as being “idiots and insane persons” was outdated and derogatory, the committee debated what would be the appropriate substitute phrasing, as well as whether a

new provision should include a requirement of an adjudication, a mandate for action by the General Assembly in enacting statutory law relating to the issue, and language that would appropriately describe voting as a right, a privilege, or both.

Related to this issue, the committee heard on several occasions from Michael Kirkman, executive director of the advocacy group Disability Rights Ohio, who discussed with the committee the considerations and problems inherent in evaluating mental incapacity for the purposes of voting, and suggested approaches the committee might use in changing the objectionable language. The committee also heard a presentation by Wilson R. Huhn, professor emeritus at the University of Akron School of Law, on behalf of the American Civil Liberties Union of Ohio, who advocated removal or revision of Article V, Section 6.

Addressing Article I, Section 6 (Slavery and Involuntary Servitude) in March 2016, the committee heard from Veronica Scherbauer, criminal justice initiatives coordinator from the Office of Attorney General, who spoke regarding human trafficking; as well as from Representative Emilia Strong Sykes, who expressed concerns relating to the section's allowance of "involuntary servitude" for "punishment of crime."

Turning to Article V, Section 1, relating to the qualifications of an elector, in May 2016 the committee heard a presentation by Carrie L. Davis, executive director of the League of Women Voters of Ohio, who, among other recommendations, advocated a change to Article V, Section 1 that would emphasize voting as a fundamental right. The committee also heard an update from Representative Alicia Reece on her proposal for a Voter Bill of Rights.

Reports and Recommendations

In 2015, the committee issued reports and recommendations for retaining in their present form Article I, Section 2 (Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges); Section 3 (Right to Assemble); Section 4 (Bearing Arms, Standing Armies, and Military Power); Section 13 (Quartering Troops); Section 17 (No Hereditary Privileges); and Section 20 (Powers Reserved to the People); and Article V, Section 4 (Exclusion from Franchise for Felony Conviction).

With regard to Article V, Section 6 (Mental Capacity to Vote), the committee deliberated an amendment that would remove the outdated language referring to persons of diminished mental capacity. A divided committee ultimately issued a report and recommendation proposing the following language to replace the section's disenfranchisement of "idiots and insane persons:"

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

After being approved by the Coordinating Committee, the report and recommendation was considered by the full Commission in 2016; however, the proposal failed to gain the requisite 22 votes in favor of adoption, and so the Commission did not adopt this report and recommendation.

2017

The Bill of Rights and Voting Committee began 2017 by addressing two sections of Article V relating to the ballot. After hearing presentations from Matthew Damschroder, an elections expert, and Erik J. Engstrom, a political science professor from the University of California – Davis, regarding balloting procedures and history, the committee voted to retain Article V, Section 2a, relating to the placement of candidate names on the ballot.

Regarding Section 2, which requires voting to be done by ballot, the committee considered and initially was prepared to add the word “secret” in order to clarify the need for a secret ballot. However, upon further consideration, the consensus of the committee was that the secret ballot requirement was well understood and had been accepted for many years, so that a change in the constitutional language was not necessary. Some committee members expressed concern that adding the word “secret” could do harm in that it may allow a suggestion that absentee ballots are not appropriate, an interpretation the committee did not want to encourage. Ultimately, the committee voted to retain the section in its current form, issuing a report and recommendation to that end.

The committee discussed Article V, Section 7, which provides for primary elections at which all nominations for state, district, county, and municipal offices are made. In particular, the committee focused on a portion of the provision that requires a preferential vote for United States Senators, observing it to have been rendered superfluous as a result of adoption of the Seventeenth Amendment to the United States Constitution. The committee found other aspects of the section raised questions, including whether federal offices should be included in the list, and whether the wording of the provision suggests anyone who wants to run for office can get on the ballot through use of a petition, or whether party candidates must use the primary process. The committee determined more research might assist with these questions, but did not have the time to conclude its review and focus on a recommendation.

Also left unresolved were several other provisions assigned to the committee. A report and recommendation for no change to Article I, Section 6 was considered, but put on hold because the section’s apparent allowance of involuntary servitude “for the punishment for crime” was a source of concern and required closer scrutiny, particularly in connection with Article II, Section 41, which allows laws to be passed providing for prison labor programs. The committee also would have taken up the topic of electronic privacy, as well as the remaining sections of Article I and Article V it had not had the opportunity to review. The committee had agreed, in late 2016, to postpone a review of Article V, Section 1, relating to the qualifications of an elector, until later in 2017 when research regarding the results of the 2016 election would be more readily available. However, time was not available to take up that review.

Reports and Recommendations

In 2017, the Bill of Rights and Voting Committee issued reports and recommendations for no change to Article V, Sections 2 and 2a, relating to election by ballot and the placement of candidate names on the ballot, respectively.

Appendix 1

**Bill of Rights and Voting
Committee**

**Reports & Recommendations
of the Committee**

Reports & Recommendations of the Committee

| Constitutional provision | Topic |
|--------------------------|--|
| Art. I, § 2 | Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges |
| Art. I, § 3 | Right to Assemble |
| Art. I, § 4 | Bearing Arms, Standing Armies, and Military Power |
| Art. I, § 13 | Quartering Troops |
| Art. I, § 17 | No Hereditary Privileges |
| Art. I, § 20 | Powers Reserved to the People |
| Art. V, § 2 | Election by Ballot |
| Art. V, § 2a | Names of Candidates on Ballot |
| Art. V, § 4 | Exclusion from Franchise for Felony Conviction |
| Art. V, § 6 | Mental Capacity to Vote |



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 2

RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 2 of the Ohio Constitution concerning the right of the people to alter, reform, or abolish government, the right of government to repeal special privileges, and equal protection. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 2 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 2 reads as follows:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the General Assembly.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Although original to the 1851 Ohio Constitution, a portion of Article I, Section 2 derives from Article VIII, Section 1 of the 1802 constitution, which stated, in part that: "every free republican government, being founded on their sole authority, and organized for the great purpose of protecting their rights and liberties, and securing their independence; to effect these ends, they

have at all times a complete power to alter, reform or abolish their government, whenever they deem it necessary.”¹

Article I, Section 2 contains provisions that address different, but related, topics: inherent political power of the people and their right to alter government; equal protection; and special privileges or immunities. Most of Section 2 has no direct corollary in the U.S. Constitution, but the section contains political principles that reflect the influence of the Declaration of Independence.

Inherent political power and the right to alter government

The recognition that “[a]ll political power is inherent in the people” and the further statement that the people “have the right to alter, reform, or abolish *** [government] whenever they may deem it necessary” are derived from the Article VIII, Section 1 of the 1802 constitution. These statements reflect the Jeffersonian principle contained in the Declaration of Independence that all political power is derived from the people.²

Equal protection and benefits

Adopted as part of the 1851 constitution, the “Equal Protection Clause” in Article I, Section 2 provides that “government is instituted for [the people’s] equal protection and benefit.” That phrase predates, yet corresponds to, the Fourteenth Amendment of the U.S. Constitution with its prohibition against states denying any person the “equal protection of the laws.” Although federal equal protection analysis has focused on issues of race, gender, or other immutable characteristics, “there is no indication from the little discussion of the equal protection clause at the 1850-51 convention that it was understood to end or ameliorate racial or gender discrimination ***.”³

Special privileges and immunities

Adopted as part of the 1851 constitution, this section’s requirement that special privileges and immunities, where granted, are subject to General Assembly alteration has no counterpart in the Declaration of Independence, the Ohio Constitution of 1802, or the U.S. Constitution.

Allowing the General Assembly control over the granting of special privileges or immunities was the part of this section that was heavily debated during the Constitutional Convention of 1850-51. The debate concerned the General Assembly’s practice of granting corporate charters containing special privileges and immunities, such as exemptions from future taxation and monopolies on toll roads and canal companies.⁴ Ultimately, the provision barred the alteration, revocation, or repeal of previously granted charters (as was required under the Contracts Clause of Article I, Section 10 of the U.S. Constitution), but permitted changes by the General Assembly in future charters. Thus, this clause ultimately was seen as subjecting corporate charters to the will of the General Assembly.

Amendments, Proposed Amendments, and Other Review

Article I, Section 2 has not been amended since its adoption as part of the 1851 Ohio Constitution. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.⁵

Litigation Involving the Provision

Those portions of Article I, Section 2 addressing the inherent political power of the people and their right to alter government have not been the subject of significant litigation, and the provision concerning “special privileges or immunities” has been the subject of little modern litigation.

Addressing the equal protection guarantee in this section, the Ohio Supreme Court has taken the position that the equal protection guarantee in Article I, Section 2 is “functionally equivalent” to the federal equal protection guarantee⁶ and “is to be construed and analyzed identically” to its federal counterpart.⁷

Presentations and Resources Considered

There were no presentations to the committee on this provision, but the committee did rely on the Report of the 1970s Ohio Constitutional Revision Commission and on Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), pp.84-88.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 2 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

Endnotes

¹ Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), p. 85.

² The Declaration of Independence states as follows:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.-- That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

³ Steinglass & Scarselli, p. 85.

⁴ *Id.*, p. 88.

⁵ Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution*, Part 11, *The Bill of Rights*, April 15, 1976, pp. 16-18, and pp. 444-46 of Appendix K of the Final Report.

⁶ *See, e.g., Pickaway Cty. Skilled Gaming, LLC v. Cordray*, 127 Ohio St.3d 104, 109, 2010-Ohio-4908, 936 N.E.2d 944, 951.

⁷ *American Assn. of Univ. Professors v. Central State Univ.*, 87 Ohio St.3d 55, 59, 1999-Ohio-254, 717 N.E.2d 286, 291 (on remand from U.S. Supreme Court).



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 3

RIGHT TO ASSEMBLE

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 3 of the Ohio Constitution concerning the right to assemble and petition. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 3 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 3 reads as follows:

The people have the right to assemble together, in a peaceable manner, to consult for the common good; to instruct their representatives; and to petition the General Assembly for the redress of grievances.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

This provision of the Ohio Constitution is original to the 1851 constitution.

Section 3 corresponds to the First Amendment of the United States Constitution, which, in addition to providing for freedom of religion, freedom of speech, and freedom of the press, protects the right of the people peaceably to assemble, and the right to petition the government for a redress of grievances.¹ While the Ohio Constitution also provides for freedom of religion

and freedom of speech and the press, it does so in separate provisions, Article I, Sections 7 and 11.

The section directly traces its origins to similar language in Article VIII, Section 19 of the 1802 constitution, which followed the 1776 Pennsylvania Declaration of Rights.² Article VIII, Section 19 of the 1802 constitution provides: “That the people have a right to assemble together in a peaceable manner to consult for their common good, to instruct their Representatives, and to apply to the Legislature for redress of grievances.” Other state constitutions predating Ohio’s contain similar protections for the rights of assembly and petition, and all stem from similar declarations of rights in much earlier British documents, including the Bill of Rights of 1689, and, most notably, the Magna Carta in 1215.³

Ohio’s provision, unlike its First Amendment counterpart, is not phrased as a limitation on the power of government but as an affirmative recognition of the rights of the people. The First Amendment also does not contain a right of the people to “instruct their representatives.”⁴

Amendments, Proposed Amendments, and Other Review

Article I, Section 3 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission recognized the right to associate and to petition the government for redress of grievances to be fundamental to the concept of ordered liberty, and that it is circumscribed only by the legitimate exercise of police powers in order to protect the health and safety of the citizenry.⁵ Thus, the 1970s Commission recommended that no change be made to the provision.⁶

Litigation Involving the Provision

The Ohio Supreme Court recognizes the fundamental nature of the right of the people to assemble. See *State v. Schwing*, 42 Ohio St. 2d 295, 302, 328 N.E.2d 379, 384 (1975) (“Both the federal (Amendment I) and the state (Section 3, Article I) constitutions recognize the inherent right of the people to assemble together in meetings.”). Nonetheless, there are no significant Ohio cases construing the “right to assemble” clause of Article I, Section 3, and the court has rarely cited it. In the 1970s, the Ohio Constitutional Revision Commission noted that when the Ohio courts have failed to interpret this provision consistently with the First Amendment of the United States Constitution, they have been reversed. See *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) (holding a city ordinance making it “unlawful for three or more persons to assemble *** on *** sidewalks and there conduct themselves in a manner annoying to persons passing by” as unconstitutionally vague), *rev’g* 21 Ohio St.2d 66 (1970).

There are no reported Ohio cases construing the instructions clause.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 3 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

Endnotes

¹ The First Amendment provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

² Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), p. 89.

³ Howard, A. E. Dick. *Magna Carta: Text and Commentary*. Revised ed. Charlottesville: Published for the Magna Carta Commission of Virginia, The UP of Virginia, (Revised Ed. 1964), p. 27.

⁴ Steinglass & Scarselli, *supra*.

⁵ Recommendations of the Education and Bill of Rights Committee, November 19, 1975, p. 4726.

⁶ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, p. 18, and p. 446 of Appendix K of the Final Report.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 4

BEARING ARMS; STANDING ARMIES; MILITARY POWER

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 4 of the Ohio Constitution concerning the right to bear arms, the prohibition against maintaining standing armies during peacetime, and the subordination of the military to the civil power. The committee issues this report pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 4 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 4, reads as follows:

The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

This provision of the Ohio Constitution is original to the 1851 Constitution, although Article VIII, Section 20, of the 1802 Constitution contained a prior version providing "[t]hat the people have a right to bear arms for the defense of themselves and the State; and as standing armies in time of peace are dangerous to liberty, they shall not be kept up: and that the military shall be kept under strict subordination to the civil power."¹

The Ohio Supreme Court analyzed this provision as follows:

The language of Section 4, Article I of the Ohio Constitution is clear. This provision is divided by two semicolons, coordinating three independent clauses. Rather than focusing merely on the preservation of a militia, as provided by the Second Amendment, the people of Ohio chose to go even further. Section 4, Article I not only suggests a preference for a militia over a standing army, and the deterrence of governmental oppression, it adds a third protection and secures to every person a fundamental *individual* right to bear arms for “their *defense and security* ***.” (Emphasis added.) This clause was obviously implemented to allow a person to possess certain firearms for defense of self and property. Accord *State v. Hogan* (1900), 63 Ohio St. 202, 218-19, 58 N.E. 572, 575.

Arnold v. City of Cleveland, 67 Ohio St.3d 35, 43, 616 N.E.2d 163, 169 (1993).

In *District of Columbia v. Heller*, 554 U.S. 570 (2008), the United States Supreme Court construed the Second Amendment to the United States Constitution as providing an individual right to bear arms.

During the pre-*Heller* period, the Ohio Supreme Court interpreted the Ohio provision as conferring a greater right in the individual to possess firearms for self-protection than that afforded by the U.S. Constitution.² Significantly, the Court in *Arnold* clarified at paragraph one of its syllabus that the Ohio Constitution was a document of independent force that could provide greater protections than its federal counterpart:

The Ohio Constitution is a document of independent force. In the areas of individual rights and civil liberties, the United States Constitution, where applicable to the states, provides a floor below which state court decisions may not fall. As long as state courts provide at least as much protection as the United States Supreme Court has provided in its interpretation of the federal Bill of Rights, state courts are unrestricted in according greater civil liberties and protections to individuals and groups.

Amendments, Proposed Amendments, and Other Review

Article I, Section 4 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Ohio Constitutional Revision Commission noted the differences between the 1802 provision, which granted the right to bear arms to individuals both for self-protection and for protection of the state, and the 1851 provision, which only indicated the right to bear arms for self-defense and security. The 1970s Commission attributed the difference to the notion of the “citizen-soldier” that was prevalent in the early days of Ohio statehood. The 1970s Commission observed, however, that it was impossible to know if this change was significant because there was no record of a debate on the issue.³

The Ohio Constitutional Revision Commission recommended no change in this section.

Litigation Involving the Provision

Article I, Section 4 has been the subject of litigation involving the regulation of the sale and ownership of assault weapons, *see Arnold, supra*, and the individual's ability to carry a firearm in a public place. *See Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633. The Ohio Supreme Court has ruled that, while fundamental, the right to bear arms is not absolute, and reasonably may be restricted in the interests of the health, safety, morals or general welfare of the public.⁴

Issues concerning the right to bear arms under Article I, Section 4 also have arisen in the context of disputes concerning the scope of the home rule power under Article XVIII, Section 3, and the Ohio Supreme Court generally has deferred to state legislation. *See City of Cleveland v. State*, 128 Ohio St.3d 135, 2010-Ohio-6318, 942 N.E.2d 370 (R.C. 9.68 is a general law that displaces municipal firearm ordinances, is part of a comprehensive statewide legislative enactment and applies uniformly across the state; therefore it does not unconstitutionally infringe municipal home rule authority); *Ohioans for Concealed Carry, Inc. v. City of Clyde*, 120 Ohio St.3d 96, 2008-Ohio-4605, 896 N.E.2d 967 (addressing the relationship between Ohio's concealed carry statutes, R.C. 2923.126 and R.C. 9.68, and Article XVIII, Section 3, and concluding that a city ordinance prohibiting firearms in municipal parks conflicted with a statewide comprehensive legislative enactment and thus was not enforceable). *But see City of Cincinnati v. Baskin*, 112 Ohio St.3d 279, 2006-Ohio-6422, 859 N.E.2d 514 (upholding city ordinance that prohibited the possession of semi-automatic rifles with a capacity of more than ten rounds, finding no conflict with state statutes that prohibited possession of semi-automatic firearm capable of firing more than thirty-one cartridges without reloading).

Presentations and Resources Considered

There were no presentations to the committee on this provision. However, in considering Article I, Section 4, the committee reviewed a fifty-state survey of similar provisions that indicated nearly every state constitution protects the individual's right to bear arms, with some, like Ohio's, recognizing that the military is subordinate to the civil power.

Conclusion

The Bill of Rights and Voting committee concludes that Article I, Section 4 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on December 11, 2014, and February 12, 2015, the committee voted to adopt this report and recommendation on February 12, 2015.

Endnotes

¹ Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* (2nd prtg. 2011), p. 90.

² *Id.*

³ Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights*, April 15, 1976, p. 19, and p. 447 of Appendix K of the Final Report.

⁴ *See, e.g., Arnold, supra.; Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, 795 N.E.2d 633.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 13

QUARTERING OF TROOPS

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 13 of the Ohio Constitution concerning the quartering of troops. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 13 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 13, reads as follows:

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner; nor, in time of war, except in the manner prescribed by law.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. The Third Amendment to the U.S. Constitution reads: "No soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."

Adopted as part of the 1851 Ohio Constitution, Article I, Section 13 is virtually identical to its predecessor, Article VIII, Section 22 of the 1802 Constitution, which reads:

That no soldier, in time of peace, be quartered in any house without the consent of the owner; nor in time of war, but in the manner prescribed by law.

The concept of quartering troops in private homes arose out of English law and custom, and was the byproduct of a military system that had transitioned from reliance upon local citizen militias to standing armies comprised of professional soldiers.¹ Eventually, Parliament's Mutiny Act protected private British citizens in England from being forced to house and feed British soldiers, requiring compensation to innkeepers and others who supplied traveling armies with food and shelter.² But the anti-quartering section of the Mutiny Act was not extended across the Atlantic, and the forced quartering of troops during the French and Indian War (1754-1763) angered colonists who felt they were being denied protections they understood to be their birthright as Englishmen.³ Attempting to defuse colonial anger, Parliament amended the Mutiny Act to include The Quartering Act of 1765, authorizing British troops to shelter in public houses or vacant structures where barracks were unavailable and clarifying that quartering in private homes was to be avoided.⁴

From the Crown's point of view, standing armies were necessary even after the war to protect British supremacy in North America, including the securing of territorial and trading interests.⁵ From the colonists' point of view, the end of the French and Indian War should have seen a reduction, rather than an increase, in troop numbers.⁶ Eventually, the role of colonial standing armies evolved to that of containing the civil unrest that ensued as the British government imposed unpopular taxes and other restrictions.⁷ Throughout this period, colonial governments were unwilling to concede the need for standing armies, the British control they symbolized, and the expense they represented.⁸

As the situation escalated, Parliament enacted a second Quartering Act in 1774 to require the quartering of troops in private homes.⁹ Citizen outrage followed, based, in part, on the growing conviction that the real purpose of the military presence was to suppress colonists' resistance to British control.¹⁰

Thus, the quartering of troops issue became a symbol of British oppression, and helped to provide justification for the independence movement.¹¹ In fact, "Quartering large bodies of armed troops among us" was one of the rights violations cited in the Declaration of Independence.¹² In the 1800s, some historians characterized the Quartering Acts, along with other parliamentary decrees limiting and controlling economic and personal liberties during colonial times, as "Intolerable Acts," a historiographical term which continues to be used to describe the despotic actions of the British government in the years leading up to the Revolutionary War.¹³

This history inspired several former colonies to include anti-quartering provisions in their state constitutions, and led to adoption of the U.S. Constitution's Third Amendment.¹⁴ It also influenced the drafters of the constitutions of Pennsylvania, Kentucky, and Tennessee, all three of which are recognized as primary sources for much of Ohio's 1802 Constitution.^{15 16}

Amendments, Proposed Amendments, and Other Review

Article I, Section 13 has not been amended since its adoption as part of the 1851 Ohio Constitution.¹⁷ The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.¹⁸

Litigation Involving the Provision

Article I, Section 13 has not been the subject of significant litigation.

The Third Amendment to the United States Constitution has been cited in some litigation, not because it references the quartering of troops *per se*, but for its support of the concept that citizens have a constitutional right to privacy that must be protected from governmental intrusion. *See e.g., Griswold v. Connecticut*, 381 U.S. 479 (1965); *Katz v. United States*, 389 U.S. 347 (1967).

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 13 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and June 11, 2015, the committee voted to adopt this report and recommendation on June 11, 2015.

Endnotes

¹ Fields, William S. and David T. Hardy. *The Third Amendment and the Issue of the Maintenance of Standing Armies: A Legal History*, 35 Am. J. Legal Hist. 393 (1991).

² Rogers, Alan. *Empire and Liberty: American Resistance to British Authority 1755-1763*. Berkeley: Univ. of California Press. 1974. Print. 76.

³ *Id.*, at 83-84.

⁴ *Id.*, at 88.

⁵ Fields & Hardy, *supra*, at 414-415.

⁶ *Id.*, at 416.

⁷ *Id.*

⁸ *Id.*, at 415.

⁹ *Id.*

¹⁰ *Id.*, at 416.

¹¹ Rogers, *supra*, at 89.

¹² Fields & Hardy, at 417-18.

¹³ Bell, J.L. “*Intolerable Acts.*” J. of the Amer. Revolution. Web. 25 June 2013. Available at <http://allthingsliberty.com/2013/06/intolerable-acts/> (accessed April 24, 2105).

¹⁴ Note, *Does Five Equal Three? Reading the Takings Clause in Light of the Third Amendment’s Protection of Houses*, 112 Columbia L.Rev. 112 (2012), 126-27.

¹⁵ Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution* New York: Oxford UP (2nd prtg.), 2011. 21-22. Print.

¹⁶ The 1796 Constitution of Tennessee includes Article 11, Section 27, which reads: “That no Soldier shall in time of peace be quartered in any House without consent of the owner, nor in time of war but in a manner prescribed by Law.” Available at: http://www.tn.gov/tsla/founding_docs/33633_Transcript.pdf (accessed April 24, 2015).

Article IX, Section 23 of the Pennsylvania Constitution of 1790 states: “That no soldier shall, in time of peace, be quartered in any house without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.” Available at: <http://www.duq.edu/academics/gumberg-library/pa-constitution/texts-of-the-constitution/1790> (accessed April 24, 2015).

Article XII, Section 25 of the 1792 Kentucky Constitution provides: “That no soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.” Available at: <http://www.kyhistory.com/cdm/ref/collection/MS/id/9926> MSS145_1_20 (accessed April 24, 2015).

Only minor differences in punctuation distinguish these three provisions from Article VIII, Section 22 of Ohio’s 1802 Constitution.

For a discussion of the quartering provisions in the Kentucky Constitution, see Ireland, Robert M. *The Kentucky State Constitution*. New York: Oxford UP (2nd Ed.) 2012. Print. A similar discussion regarding the Tennessee Constitution may be found at Laska, Lewis L. *The Tennessee State Constitution*. New York: Oxford UP. 2011. 64. Print.

¹⁷ Steinglass & Scarselli, *supra*, at 112.

¹⁸ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 36-37, and pp. 464-65 of Appendix K of the Final Report.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 17

NO HEREDITARY PRIVILEGES

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 17 of the Ohio Constitution concerning the granting or conferring of hereditary privileges. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 17 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 17, reads as follows:

No hereditary emoluments, honors, or privileges, shall ever be granted or conferred by this State.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution. Article I, Sections 9 and 10 of the U.S. Constitution similarly prohibit the granting of titles of nobility.¹

That hereditary titles and privileges had no place in the emerging egalitarian ideals of the American colonies is a concept reflected in the writings of prominent statesmen, political theorists, and constitutional framers of the time. As observed by Alexander Hamilton, "Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people."²

The prohibition of such titles and distinctions also was seen as necessary to the survival of the young republic, when the hard-won gains of the Revolutionary War were threatened by both British and French trade interference and other acts of aggression in the period leading up to the War of 1812. Out of the fear that foreign influence, bought with hereditary titles and aristocratic privileges, could weaken nationalistic resolve, constitutional framers both at the federal and state levels included prohibitions against such “titles of nobility” in their constitutions.³ Hereditary titles were seen as the antithesis of a societal aspiration that rejected Old World notions of birthright and a fixed social status in favor of liberty, equality, and economic opportunity. As Thomas Jefferson wrote on the occasion of the fiftieth anniversary of the signing of the Declaration of Independence, and near the end of his life:

That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few booted and spurred, ready to ride them legitimately, by the grace of God.⁴

Article I, Section 17, adopted as part of the 1851 Ohio Constitution, is virtually identical to Section 24 of Article VIII of the 1802 Constitution, which reads: “That no hereditary emoluments, privileges, or honors shall ever be granted or conferred by this state.”⁵ The record of the 1802 Constitutional Convention does not reflect the provision’s source, but it is identical to the analogous provision in Article II, Section 30 of the Tennessee Constitution of 1796.

Amendments, Proposed Amendments, and Other Review

Article I, Section 17 has not been amended since its adoption as part of the 1851 Ohio Constitution.⁶ The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.⁷

Litigation Involving the Provision

Article I, Section 17 has not been the subject of significant litigation.

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 17 should be retained in its current form.

Date Adopted

After formal consideration by the Bill of Rights and Voting Committee on April 9, 2015 and June 11, 2015, the committee voted to adopt this report and recommendation on June 11, 2015.

Endnotes

¹ U.S. Const. Art. I, Section 9 reads, in part: “No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.” Section 10 reads, in part: “No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.” Available at: http://www.archives.gov/exhibits/charters/constitution_transcript.html (accessed April 24, 2015).

² The Federalist No. 84 (A. Hamilton). Available at: http://www.gutenberg.org/files/1404/1404-h/1404-h.htm#link2H_4_0084 (accessed April 24, 2015).

³ See, e.g., Hart, Gideon M. *The “Original” Thirteenth Amendment: the Misunderstood Titles of Nobility Amendment*, 94 Marq. L. Rev. 311, 335-47 (2010-2011).

⁴ Letter to Roger C. Weightman, June 24, 1826 (Thomas Jefferson), as reprinted in *50 Core American Documents*. Ed. Christopher Burkett. Ashland: Ashland Univ., Ashbrook Press. 2013. Print. 136-37.

⁵ Steinglass, Steven H. and Gino J. Scarselli. *The Ohio State Constitution*. New York: Oxford UP (2nd printing), 2011. 123. Print.

⁶ *Id.*

⁷ Ohio Constitutional Revision Commission, Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights, April 15, 1976, pp. 42-43, and pp. 470-71 of Appendix K of the Final Report.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE I, SECTION 20

POWERS RESERVED TO THE PEOPLE

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article I, Section 20 of the Ohio Constitution concerning powers that are reserved to or retained by the people. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article I, Section 20 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article I, Section 20 reads as follows:

This enumeration of rights shall not be construed to impair or deny others retained by the people, and all powers, not herein delegated, remain with the people.

Adopted as part of the 1851 Ohio Constitution, the provision was preceded by Article VIII, Section 28 of the 1802 constitution, which reads:

To guard against the transgressions of the high powers which we have delegated, we declare that all powers not hereby delegated remain with the people.

The Bill of Rights as set forth in Article I is a declaration of rights and liberties similar to those contained in the United States Constitution.

Mirroring language from both the Ninth and Tenth Amendments to the United States Constitution, Section 20 has been viewed as lacking much legal force other than expressing the view that the powers of the government are derived from the people.¹ Despite the textual similarities to the federal amendments, Ohio courts have generally not looked to federal law in

interpreting Section 20. In part, this is because there is little United States Supreme Court guidance on the meaning of the Ninth Amendment and because the Tenth Amendment does not address the relationship between the individual and the state.

The Ninth Amendment states:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Ninth Amendment has been the subject of much scholarly commentary but little judicial construction. For example, constitutional scholars have variously interpreted the Ninth Amendment as preserving natural rights that were recognized in 1791 or that changed over time, as incorporating rights contained in state constitutions and the common law, and as supporting federalism and the autonomy of local government.² More importantly, the U.S. Supreme Court has been reluctant to offer much guidance as to the meaning of the Amendment. For example, the most noteworthy reliance on the Ninth Amendment by the Court was in a concurring opinion by Justice Goldberg in *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). In agreeing with the decision striking down the Connecticut limitation on birth control, Justice Goldberg concluded that a right of privacy in a marital relationship is a right retained by the people because the Ninth Amendment was meant to protect individual rights that otherwise were not listed in the Bill of Rights. However, despite Justice Goldberg's concurrence, the Court has not provided an authoritative construction of the amendment.³ Instead, the Court has preferred to rely on the liberty provision of the Fourteenth Amendment when dealing with unenumerated rights.⁴ As a result, Ohio courts are unable to rely on Ninth Amendment jurisprudence to give meaning to Section 20.

The Tenth Amendment provides:

The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people.

The Tenth Amendment initially addresses the relationship between federal and state power. The Court once famously noted that “[t]he amendment states but a truism that all is retained which has not been surrendered.” *United States v. Darby*, 312 U.S. 100, 124 (1941). In more recent years, however, the Court has utilized the Tenth Amendment to limit federal actions that commandeered state institutions. For example, the Court has held that Congress cannot require a state to choose between expanding Medicaid or losing all Medicaid-related federal funding (*Natl. Fedn. of Indep. Business v. Sebelius*, ___ U.S. ___, 132 S.Ct. 2566 (2012)); cannot require a state to choose between storing toxic waste or passing a regulatory scheme designed by Congress (*New York v. United States*, 505 U.S. 144 (1992)); and cannot require state police officers to perform background checks of prospective handgun purchasers (*Printz v. United States*, 521 U.S. 898 (1997)).

Although the Court has given some meaning to the first portion of the Tenth Amendment, it has not done the same for the final “reserved to the people” language of the amendment. Thus, the Tenth Amendment does not provide guidance as to the proper construction of Section 20.

Despite the absence of guidance from the federal constitution, a source of guidance could come from the constitutions of other states. Some state constitutions adopted prior to the federal constitution contained inherent or natural rights clauses,⁵ and today a majority of states have unenumerated powers clauses. State courts have adopted a variety of approaches when interpreting these provisions, with decisions ranging from those assigning little significance to them to those concluding that they protect a variety of unenumerated rights.

Amendments, Proposed Amendments, and Other Review

Article I, Section 20 has not been amended since its adoption as part of the 1851 Ohio Constitution.⁶ The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this section.⁷

Litigation Involving the Provision

Ohio courts generally have not dealt with Section 20, with the major decision construing it being over 100 years old. In 1876, the Ohio Supreme Court stated that the section “only declares that powers not delegated remain with the people. It does not purport to limit or modify delegated powers.” *State ex rel. Atty. Gen. v. Covington*, 29 Ohio St. 102, 112 (1876). In that case, the General Assembly passed a law calling for the state to select the police commissioners of Cincinnati. Arguing the law was unconstitutional under Section 20, respondents argued that at the time of adoption of the 1851 constitution, the power to appoint a police board was local. Thus, because the power had not been delegated to the General Assembly, it was to remain with the people. The Court rejected this argument, stating:

By such interpretation of the constitution, the body of law in force at the time of its adoption would have become as permanent and unchangeable as the constitution itself. For such argument would apply with equal force to every subject of legislation concerning which no special direction is contained in the constitution. Indeed, the true rule for ascertaining the powers of the legislature is to assume its power under the general grant ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition.

Id. at 113-14.

Other Ohio Supreme Court decisions generally cite Section 20 only in conjunction with other sections of the Bill of Rights. See, e.g., *Mirick v. Gims*, 79 Ohio St. 174, 86 N.E. 880 (1908)(applying Section 20 and Article II, Section 28 to conclude that the police powers of the state are limited by the Declaration of Rights such that they may not be exercised in an unreasonable or arbitrary manner). As such, Section 20 has not been considered as containing any particular rights not otherwise found in the Ohio Constitution.

Currently, Section 20 generally is only raised in death penalty *habeas corpus* cases in which the defendant argues his or her trial violated multiple state and federal constitutional rights.

However, no court has relied on Section 20 to overturn a conviction. *See, e.g., State v. Mack*, 8th Dist. No. 101261, 2015-Ohio-2149, 2015 Ohio App. LEXIS 2075, 2015 WL 3560451; *Lang v. Bobby*, 2015 U.S. Dist. LEXIS 39365, 2015 WL 1423490 (N.D. Ohio).

Presentations and Resources Considered

There were no presentations to the committee on this provision.

Conclusion

The Bill of Rights and Voting Committee concludes that Article I, Section 20 should be retained in its current form.

Date Issued

After formal consideration by the Bill of Rights and Voting Committee on November 12, 2015, the committee voted to issue this report and recommendation on November 12, 2015.

Endnotes

¹ Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 125 (2nd prtg. 2011).

² Ryan C. Williams, *The Ninth Amendment as a Rule of Construction*, 111 Columbia L. Rev. 498, 500 (2011).

³ *See, e.g., Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment*, 83 Texas L.Rev. 597, 708-709 (2005).

⁴ *Id.* at 714.

⁵ *See, e.g., Pa. Const. of 1776, Art. I, Declaration of Rights* (“That all men are born equally free and independent, and have certain natural, inherent and inalienable rights, amongst which are, the enjoying and defending of life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety.”); *Va. Bill of Rights of 1776, Section 1* (“That all men * * * have certain inherent rights [that] cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness and safety.”).

⁶ Steinglass & Scarselli, *supra*.

⁷ Ohio Constitutional Revision Commission (1970-77), *Recommendations for Amendments to the Ohio Constitution, Part 11, The Bill of Rights*, 50-51 (Apr. 15, 1976), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt11%20bill%20of%20rights.pdf>, (last visited Oct. 5, 2015).

See also Ohio Constitutional Revision Commission, *Recommendations for Amendments to the Ohio Constitution, Final Report, Index to Proceedings and Research, Appendix K*, 478-79 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Oct. 5, 2015).



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 2

ELECTION BY BALLOT

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 2 of the Ohio Constitution concerning the requirement that elections be by ballot. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article V, Section 2 be retained in its current form.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2 reads as follows:

All elections shall be by ballot.

Adopted as part of the 1851 constitution, Section 2 was taken verbatim from Article IV, Section, 2 of the 1802 Constitution, and has never been amended.

The 19th century saw significant changes to the electoral process, particularly concerning the widespread adoption of what became known as the secret, or "Australian," ballot. Proponents of the Australian ballot urged the use of an official ballot that included the names of all the candidates for office, was printed at public expense, was distributed only at polling places, and was marked in secret.¹ In 1888, Massachusetts became the first state to adopt the Australian ballot, and virtually all of the states embraced this reform by the turn of the century.²

Secrecy of the ballot was the most important feature of the Australian ballot, and prior to its adoption Americans used to vote with ballots provided them by political parties, with their

voices (*viva voce*), with their hands, or with their feet.³ Of the many variants of the Australian ballot, in 1891 Ohio chose the party column format, which stayed in place throughout the first half of the 20th century.^{4 5}

Ohio ballot reform in the latter portion of the 19th century addressed corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes, all activities enabled by the fact that voters were not provided a list of candidates, could remove ballots from the polling location, and were not required to place ballots directly into the ballot box.⁶ Upon his election in 1890, Ohio Governor James E. Campbell sought to secure a “free, secret, untrammelled and unpurchased ballot which shall be honestly counted and returned.”⁷ That effort culminated in the General Assembly’s 1891 enactment of the Australian Ballot Law.

Although the Ohio Constitution does not explicitly require a secret ballot, a dispute in the early 20th century about whether voting machines violated Section 2 ultimately resulted in case law holding that the ballot is secret.

In *State ex rel. Karlinger v. Bd. of Deputy State Supervisors of Elections*, 80 Ohio St. 471, 89 N.E. 33 (1909), the Supreme Court of Ohio held the General Assembly lacked the power to adopt a statute permitting the use of voting machines, and that the proposed machines violated Section 2’s requirement that elections be by ballot. Acknowledging conflicting court decisions from around the country, the court expressed skepticism about the reliability of voting machines and the ability of voters to quickly master the machine and cast their vote. *See Id.*, 80 Ohio St. at 488-89, 89 N.E. at 36.

The delegates to the 1912 Ohio Constitutional Convention, taking a more progressive view, proposed an amendment to permit the use of voting machines, but voters rejected the proposal, leaving the question of voting machines unsettled.⁸ In *State ex rel. Automatic Registering Machine Co. v. Green*, 121 Ohio St. 301, 310, 168 N.E. 131, 134 (1929), the Supreme Court of Ohio overruled *Karlinger* and upheld the use of voting machines, holding, as syllabus law, that the term “ballot” “designates a method of conducting elections which will insure secrecy, as distinguished from open or viva-voce voting.”

In reaching this decision, the Court relied on decisions from other states upholding the use of voting machines, as well as an article by Professor John H. Wigmore, who stated that “his search has convinced him that in common usage the term *ballot* has always been used, without an adjective, to express the idea of a vote cast in such a way that its purport is unknown at the time of casting – in short, of ‘secret’ voting.” *See Green, supra*, 121 Ohio St. at 308, 168 N.E. at 134 (citing Wigmore, *Ballot Reform: Its Constitutionality*, 23 *American Law Review* 719, 725 (1889)). Finally, the Court recognized that the meaning of constitutional provisions must be permitted to evolve as new technologies develop.⁹

Amendments, Proposed Amendments, and Other Review

In the 1970s, the Ohio Constitutional Revision Commission (1970s Commission) did not recommend a change to Section 2, concluding that the fundamental principle of the secret ballot – that “voters must be permitted to express their views on election matters without fear of retaliation” – is a proper matter for the constitution.

Litigation Involving the Provision

The Supreme Court of Ohio’s only recent opportunity to consider Section 2 involved a criminal case in which the defendant was charged with five counts of ballot tampering. In *State v. Jackson*, 102 Ohio St.3d 380, 2004-Ohio-3206, 811 N.E.2d 68, a county board of elections employee was accused of marking the ballots of nursing home residents in favor of a candidate that was not their preference. When the county prosecutor sought to introduce the allegedly tainted ballots, which had been seized pursuant to a valid warrant, the defendant argued Section 2 required the ballots’ secrecy. In rejecting this argument, the Court first noted that Section 2 “aspires to ballot secrecy, but it is not self-executing.” *Id.* at ¶ 24. The Court then decided the question based on statutory law, concluding that the statutory requirement of ballot secrecy applies only to election proceedings and not to the admission of evidence in a criminal trial, adding, “applying statutory ballot secrecy to preclude using a ballot as evidence of a crime conflicts with a board of elections’ duties to investigate and gather evidence of election irregularities.” *Id.* at ¶ 33.

Presentations and Resources Considered

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.¹⁰

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated

so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891. He noted that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement.

Discussion and Consideration

In considering Article V, Section 2, some committee members expressed that embedding the concept of a secret ballot in the state’s foundational document would emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret. Initially, committee members sought to add the word “secret” to Section 2 on the basis that the recommendation would merely constitutionalize a concept that is already accepted under case law.

However, after further consideration, a majority of the committee concluded that, because the requirement is well-established and has been recognized by the Supreme Court of Ohio since the 1920s, it may not be necessary to add the word “secret” to Section 2.

In reaching this conclusion, committee members commented that adding the word “secret” could be interpreted as indicating a greater level of secrecy than is already understood to be the case, potentially permitting an argument that absentee ballots are not appropriate. Other members similarly cautioned that a change could have unintended consequences, such as potentially affecting issues surrounding voter coercion and voter fraud. In the absence of evidence that problems have arisen due to the lack of a provision expressly requiring ballots to be secret, committee members were reluctant to recommend a constitutional change. Ultimately, the committee’s consensus was to leave the section in its present form.

Conclusion

The Bill of Rights and Voting Committee recommends that Article V, Section 2 be retained in its present form.

Date Issued

After considering this report and recommendation on March 9, 2017 and May 11, 2017, the Bill of Rights and Voting Committee voted to issue this report and recommendation on May 11, 2017.

Endnotes

¹ See generally L. E. Fredman, *The Australian Ballot: The Story of an American Reform* (1968); see also Erik J. Engstrom & Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 842-43 (2016).

² See Alan Ware, *Anti-Partism and Party Control of Political Reform in the United States: The Case of the Australian Ballot*, 30 *Brit. J. Pol. Sci.* 1, 9 (2000).

³ See Jill Lepore, *Rock, Paper, Scissors: How We Used to Vote*, *The New Yorker* (Oct. 13, 2008). Available at: <http://www.newyorker.com/magazine/2008/10/13/rock-paper-scissors> (last visited Feb. 26, 2017). See also, Eldon Cobb Evans, *A History of the Australian Ballot System in the United States*, 1917.

⁴ In their introduction to their law review article on ballot formats, Professors Engstrom and Roberts identified a number of state variations in ballot formats.

Some states line candidates in party columns while others list candidates by office. Some states provide for party emblems at the top of the ballot. Others provide a box at the top of the ballot allowing voters to simply cast a straight ticket with one check mark. Moreover, states have varied in how long they have stuck with one type of ballot.

Engstrom & Roberts, *supra*, note 1 at 841.

⁵ Ohio first adopted what is known as the party column format of the ballot, but it switched to the office bloc format in 1949 with the adoption of Article V, Section 2a, of the Ohio Constitution. See, *id.* at 854-56.

⁶ *Australian Ballot*, Ohio History Central, http://www.ohiohistorycentral.org/w/Australian_Ballot [https://perma.cc/F267-AFJQ].

⁷ *Id.*

⁸ The proposed amendment on voting machines provided as follows: “All elections shall be either by ballot or by mechanical device, or both, preserving the secrecy of the vote. Laws may be enacted to regulate the preparation of the ballot and to determine the application of such mechanical device.” Proceedings and Debates of the Constitutional Convention of the State of Ohio, Vol. 2, 1321, 1795, & 1959 (1913).

⁹ The Court stated:

It was manifestly impossible for the framers of the Ohio Constitution to foresee all of the mechanical developments of our modern age. Just as our forefathers in drafting the national Constitution could not foresee the time when the term ‘post roads’ would be applied to airplane traffic – a traffic through air lanes which have not the slightest physical resemblance to the highway, as it has been known from the time of the Egyptians down – so the framers of the Ohio Constitution could not well foresee the time when a voter, by manipulating a lever, could mark either a straight ticket or a split ticket with exactly the same definiteness of individual expression as when he marks the ballot in his hand. However, surely the impress upon the record of a machine is not much farther removed from marking the ballot than the impress upon the key of the typewriter is removal from the actual making of characters of the alphabet by hand. If typewriting is the equivalent of long-hand, how can voting by machine be said essentially to differ, except in its efficiency, from voting by the old system of the ballot?

We think that the constitutional provision was meant merely to relate to the essential secrecy of the indication of the voter’s choice; that this secrecy has been demonstrated to be retained and enhanced by the use of voting machines; that, by the vast weight of authority, the Karlinger Case was an incorrect decision, and therefore we overrule that holding.

Automatic Registering Machine Co., 121 Ohio St. at 310-11, 168 N.E. at 134.

¹⁰ See Engstrom & Roberts, *supra* note 1.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 2a

NAMES OF CANDIDATES ON BALLOT

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 2a of the Ohio Constitution concerning the names of candidates on the ballot. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article V, Section 2a be retained in its current form.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 2a reads as follows:

The names of all candidates for an office at any election shall be arranged in a group under the title of that office. The general assembly shall provide by law the means by which ballots shall give each candidate's name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used. At any election in which a candidate's party designation appears on the ballot, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in less prominent type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States, and other than candidates for governor and lieutenant governor) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

Proposed by initiative in 1949, Section 2a was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties.¹ Previously, voters could cast a straight-party vote by marking a single “X” on the ballot, a method known as the “party column format.”² With the adoption of Section 2a, boards of elections began using an office-bloc or office-type ballot by which voters would cast their vote for each individual candidate for office.³

Originally, the section required each candidate’s name to appear, where reasonably possible, “substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs.”⁴ In 1974, the Supreme Court of Ohio addressed whether this requirement prohibited the use of voting machines and other means of voting that rotated names on a precinct-by-precinct basis. *See State ex rel. Roof v. Hardin Cty. Bd. of Commrs*, 39 Ohio St.2d 130, 314 N.E.2d 172 (1974). The Court held that “although the Constitution does not prohibit the use of voting machines, it does require that among the various methods of machine rotation that are economically and administratively feasible, the only method that may be utilized is the one which most closely approaches perfect rotation. Precinct-by-precinct rotation does not comply with this requirement and is, therefore, unconstitutional.” *Id.*, 39 Ohio St.2d at 134, 314 N.E.2d at 176.

To address the issue, voters approved an amendment in 1975 that allowed the General Assembly “to provide by law the means by which ballots shall give each candidate’s name reasonably equal position by rotation or other comparable methods to the extent practical and appropriate to the voting procedure used.”⁵

In 1976, Section 2a again was amended to indicate the governor and lieutenant governor, like the United States president and vice president, are exempt from the requirement that candidates appear on the ballot and must be voted on as separate candidates.⁶

While most states require ballot rotation by statute, Ohio is the only state to prescribe ballot rotation by constitutional provision.⁷

Amendments, Proposed Amendments, and Other Review

In its March 1975 report, the Ohio Constitutional Revision Commission (1970s Commission) recommended removal of Section 2a’s self-executing language that had been interpreted as requiring perfect rotation of names on the ballot, instead preferring to allow the General Assembly to enact law providing for rotation.⁸ Acknowledging that no candidate should be able to gain an advantage by ballot position, the 1970s Commission found the “perfect rotation” requirement to be too restrictive in that it could be used to invalidate election results due to simple printing errors, prevent the use of emerging new technologies for voting, and cause other difficulties and expenses for county boards of elections.⁹ The 1970s Commission further recommended that Section 2a be expanded to cover all elections, not merely general elections, removing a clause that could be interpreted as emphasizing party over candidate names in a primary or non-partisan election, and removing reference to type-size and appearance because future ballots may not be printed.¹⁰ The 1970s Commission asserted its recommendations were

intended to “create a more flexible and workable approach to achieving fairness in the balloting process.”¹¹

Litigation Involving the Provision

The Supreme Court of Ohio has acknowledged that voting irregularities, such as the failure to properly rotate candidate names and problems with voting machines, may be grounds for setting aside the results of an election. *See In re Election of Nov. 6, 1990, for the Office of Attorney General of Ohio*, 58 Ohio St. 3d 103, 569 N.E.2d 447 (1991). However, before election results are invalidated, it must be established by “clear and convincing” evidence that such irregularities occurred and that they affected enough votes to change or make uncertain the result of the election. *Id.*, 58 Ohio St.3d at 105, 569 N.E.2d at 450.

Presentations and Resources Considered

Damschroder Presentation

On February 9, 2017, Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State Jon Husted, and former director of the Franklin County Board of Elections, presented to the committee on the order of candidate names on the ballot.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens. He continued that, within each of the ballot categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, Mr. Damschroder said, within each office contest, candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. He described that other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts the list of candidate names down one, and so on through each of the precincts. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot the voter would see at

the polls on Election Day. As a result, a precinct's voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding ballot questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

Engstrom Presentation

On February 9, 2017, Erik J. Engstrom, professor of political science from the University of California, Davis, presented to the committee on the politics of ballot choice, which is the topic of a recent law review co-authored by Prof. Engstrom.¹²

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves would print the ballots and distribute them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, the states began to reform the way they conducted elections by adopting the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, all the candidates are listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format. Prof. Engstrom said most states prescribe ballot order by statute, with Ohio being unique in setting out the requirement in the constitution.

Discussion and Consideration

After a brief discussion, the committee agreed that the various amendments to Section 2a, particularly the 1975 amendment that allows the General Assembly the flexibility to enact law to honor the provision's goal of ballot fairness while accommodating new voting methods and technologies, allow the section to continue to serve the state well. Thus, the consensus of the committee was that no changes to the section are warranted at this time.

Conclusion

The Bill of Rights and Voting Committee recommends that Article V, Section 2a be retained in its present form.

Date Issued

After considering this report and recommendation on March 9, 2017, the Bill of Rights and Voting Committee voted to issue this report and recommendation on March 9, 2017.

Endnotes

¹ Steven H. Steinglass and Gino J. Scarselli, *The Ohio State Constitution* 215 (2nd prtg. 2011); Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839, 854 (2016).

² *Id.*

³ *Id.*

⁴ As originally adopted in 1949, Section 2a read as follows:

The names of all candidates for an office at any general election shall be arranged in a group under the title of that office, and shall be so alternated that each name shall appear (in so far as may be reasonably possible) substantially an equal number of times at the beginning, at the end, and in each intermediate place, if any, of the group in which such name belongs. Except at a Party Primary or in a non-partisan election, the name or designation of each candidate's party, if any, shall be printed under or after each candidate's name in lighter and smaller type face than that in which the candidate's name is printed. An elector may vote for candidates (other than candidates for electors of President and Vice-President of the United States) only and in no other way than by indicating his vote for each candidate separately from the indication of his vote for any other candidate.

⁵ Amendment 6 appeared on the November 4, 1975 ballot as the "Ohio Rotation of Candidate Names on Ballots Amendment." Available at: [https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_\(1975\)](https://ballotpedia.org/Ohio_Rotation_of_Candidate_Names_on_Ballots,_Amendment_6_(1975)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110475.aspx> (last visited Feb. 26, 2017).

The rotation requirements of Section 2a are effectuated by R.C. 3513.15, which provides:

The names of the candidates in each group of two or more candidates seeking the same nomination or election at a primary election, except delegates and alternates to the national

convention of a political party, shall be rotated and printed as provided in section 3505.03 of the Revised Code, except that no indication of membership in or affiliation with a political party shall be printed after or under the candidate's name. When the names of the first choices for president of candidates for delegate and alternate are not grouped with the names of such candidates, the names of the first choices for president shall be rotated in the same manner as the names of candidates. The specific form and size of the ballot shall be prescribed by the secretary of state in compliance with this chapter.

It shall not be necessary to have the names of candidates for member of a county central committee printed on the ballots provided for absentee voters, and the board may cause the names of such candidates to be written on said ballots in the spaces provided therefor.

The secretary of state shall prescribe the procedure for rotating the names of candidates on the ballot and the form of the ballot for the election of delegates and alternates to the national convention of a political party in accordance with section 3513.151 of the Revised Code.

R.C. 3505.03 sets out the requirements for use of the “office-type ballot,” indicating, in part:

On the office type ballot shall be printed the names of all candidates for election to offices, except judicial offices, who were nominated at the most recent primary election as candidates of a political party or who were nominated in accordance with section 3513.02 of the Revised Code, and the names of all candidates for election to offices who were nominated by nominating petitions, except candidates for judicial offices, for member of the state board of education, for member of a board of education, for municipal offices, and for township offices.

⁶ Amendment 1 on the June 1976 Ballot, proposing, inter alia, to require the lieutenant governor to be elected jointly with the governor. The measure passed by a margin of 61.16 percent to 38.84 percent. Ballotpedia, “Ohio Joint Election of Governor and Lieutenant Governor, Amendment 1 (June 1976), available at [https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_\(June_1976\)](https://ballotpedia.org/Ohio_Joint_Election_of_Governor_and_Lieutenant_Governor,_Amendment_1_(June_1976)) (last visited Feb. 26, 2017); <https://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110276.aspx> (last visited Feb. 26, 2017).

⁷ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 16 (March 15, 1975), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf>, (last visited Feb. 26, 2017).

⁸ *Id.* at 17.

⁹ *Id.* at 18.

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² See Engstrom & Roberts, *supra*, note 1.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 4

EXCLUSION FROM FRANCHISE FOR FELONY CONVICTION

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 4 of the Ohio Constitution concerning the disenfranchisement of persons convicted of a felony. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that no change be made to Article V, Section 4 of the Ohio Constitution and that the provision be retained in its current form.

Background

Article V, Section 4 reads as follows:

The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony.

The clear purpose of the provision is to disqualify from voting, and from holding public office, persons who have been convicted of a felony. The provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.¹

Adopted as part of the 1851 Ohio Constitution, the provision was amended in 1976. The word "felony" is not original to the 1851 Ohio Constitution. Before it was revised, Article V, Section 4 stated:

The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of bribery, perjury, or other infamous crime.

The section is not self-executing, but empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising. In the exercise of this authority, the General Assembly enacted Ohio Revised Code Section 2961.01, which provides that a person who pleads or is found guilty of a felony “is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.” R.C. 2961.01(A)(1).² When a felon is granted parole, judicial release, or conditional pardon, or is released under a control sanction, the statute provides that he or she is competent to be an elector during that period. R.C. 2961.01(A)(2). Finally, under the statute, a felon is incompetent to “circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.” R.C. 2961.01(B).

Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (“1970s Commission”) recognized that the phrase “infamous crime” was vague and out-of-date, and that the term “felony” would bring the constitutional provision into line with the criminal statutes. The Elections and Suffrage Committee (“E&S Committee”) of the 1970s Commission, in attempting to discern the definition of “infamous crime,” noted that in some states the term is synonymous with “felony.”³ A “felony” generally is described as an offense for which more than a year’s incarceration may be imposed, or an offense otherwise identified as a felony in the particular criminal statute. R.C. 2901.02 (E), (F).

The E&S Committee also was influenced by the enactment in 1973 of the new Ohio Criminal Code (effective January 1, 1974), which created R.C. 2961.01, specifying that felons are disenfranchised only during their incarceration.⁴ The E&S Committee initially recommended no change to the provision’s phrase “bribery, perjury, or other infamous crime,” focusing instead on a proposal to eliminate Section 6 (disenfranchisement of mentally incapacitated persons) and to add the phrase “and any person mentally incompetent for the purpose of voting” to the end of Section 4.⁵

However, on September 19, 1974, the E&S Committee issued a revision of its recommendation, by which it indicated it was no longer recommending that disenfranchisement of the mentally impaired be included in the provision.⁶ The E&S Committee further recommended that reference to eligibility for public office be severed from the provision, instead suggesting that the General Assembly could enact laws to preclude felons from holding public office even after the conclusion of their incarceration. Most importantly, the E&S Committee recommended a change that would substitute the word “felony” for “bribery, perjury, or other infamous crime.”⁷

The 1970s Commission did not approve the E&S Committee’s revised recommendation in full, ultimately only recommending the substitution of the word “felony” for “bribery, perjury, or other infamous crime.” In so recommending, the 1970s Commission articulated its desire “to preserve the flexibility now available to the General Assembly to expand or restrict the franchise in relation to felons in accordance with social and related trends.”⁸ Thus, the 1970s Commission recognized that the constitutional provision needed to track the statutory enactment under the

criminal code, which the 1970s Commission recognized as providing that “when a convicted felon is granted probation, parole, or conditional pardon, he is competent to be an elector during such time and until his full obligation has been performed and thereafter following his final discharge.”⁹

The 1970s Commission recommendation, that Article V, Section 4 read that “The General Assembly shall have power to exclude from the privilege of voting, or of being eligible to office, any person convicted of a felony,” was presented in the 111th General Assembly by resolution pursuant to Am. S.J.R. No. 16, submitted by ballot and approved by voters, with an effective date of June 8, 1976.¹⁰

Litigation Involving the Provision

Although felony disenfranchisement has been challenged under the Equal Protection Clause, it has been upheld by the United States Supreme Court. In *Richardson v. Ramirez*, 418 U.S. 24, 33 (1974), individuals with felony convictions argued that California’s felony disenfranchisement law was unconstitutional because it was not narrowly tailored to meet a compelling state interest. However, the U.S. Supreme Court upheld the law on the basis that the Fourteenth Amendment guarantees the right to vote “except for participation in rebellion, or other crime.” *Id.* at 54. The Court therefore found an “affirmative sanction” for felony disenfranchisement laws in the Fourteenth Amendment. *Id.*

The Ohio Supreme Court has cited Article V, Section 4 only a few times, primarily in cases pertaining to eligibility for public office, rather than to the disenfranchisement of felons.

In *Mason v. State ex rel. McCoy*, 58 Ohio St. 30, 50 N.E. 6 (1898), John W. Mason, after being elected Adams County probate judge, was removed from office for buying votes during his campaign. Mason argued that Article V, Section 4 mandated that the only way he could be removed from office was if he had been convicted of a criminal offense. The court disagreed, stating:

The most that can be said for section 4, article 5, of the Constitution of Ohio is that the general assembly is, by it, given the absolute power to exclude any person from the privilege of ever being eligible to an office – it does not contemplate a grant of a right to an office to all persons not so made eligible to hold one.

Id., 58 Ohio St. at ____, 50 N.E. at 16.

In *Grooms v. State*, 83 Ohio St. 408, 94 N.E. 743 (1911), another Adams County voter fraud case, the court considered whether it was unconstitutional for a criminal sentence to include disenfranchisement for five years where the accused pled guilty to selling his vote for ten dollars.¹¹ Against Grooms’ argument that bribery is not an “infamous crime,” the court interpreted the prior version of Article V, Section 4, disenfranchising a person convicted of “bribery, perjury, or other infamous crime,” as indicating bribery is, in fact, an “infamous crime.” Although the decision does not specify the criminal charge, the court’s decision appears

to be based on the notion that, regardless of whether selling a vote is categorized as “bribery,” it does meet the definition of “infamous crime,” and so the disenfranchisement was not unconstitutional.

The unsuccessful argument in *Mason, supra*, again was attempted in *In re Removal of Member of Council Joseph Coppola*, 155 Ohio St. 329, 98 N.E.2d 807 (1951), wherein the court reiterated that Article V, Section 4 does not infringe the power of the General Assembly to legislate as to reasonable qualifications for office, or to enact laws providing for the removal of a public officer for misconduct. *Id.*, 155 Ohio St. at 335-36, 98 N.E.2d at 811.

Interpreting the amended, current version of Article V, Section 4, the Ohio Supreme Court in *State v. Bissantz*, 40 Ohio St.3d 112, 532 N.E.2d 126 (1988), addressed whether a person convicted of bribery in office is forever barred from holding public office if his record is expunged. The court concluded the General Assembly was within its authority under Article V, Section 4 to impose qualifications on those who seek public office, and that the prohibition “reflects an obvious, legitimate public policy * * * that felons convicted of crimes directly related to and arising out of their position of public trust should not ever again be entitled to enjoy such a position.” *Id.*, 40 Ohio St.3d at 116, 532 N.E.2d at 130.

Presentations and Resources Considered

On October 9, 2014, Douglas A. Berman, professor of law at the Moritz College of Law, Ohio State University, presented to the committee on felony disenfranchisement. Professor Berman said Ohio is recognized as one of the few states that allow felons to vote once they have been released from incarceration. Stating that voting is a right, privilege, and responsibility, Prof. Berman expressed that the state must have a strong rationale before disenfranchising.

Asserting the disproportionate impact of felon disenfranchisement on minorities, Prof. Berman cited to statistics showing that, while only 0.6 percent of Ohio’s entire voting population is disenfranchised by having a current felony sentence, that rate is four times higher for African Americans, where 2.4 percent of all voting-age Ohioans of this racial category are disenfranchised by having a felony conviction. Prof. Berman noted that approximately 25,000 of the 50,000 prison population in Ohio is African American.

Prof. Berman asserted that re-enfranchised felons are less likely to commit additional crimes because voting allows them to invest in the laws of the state. Upon release from incarceration, the act of voting becomes a strong symbol of re-entry into society, according to Prof. Berman.

Stating his belief that even those currently serving time should be allowed to vote, Prof. Berman stated that Maine and Vermont allow for this without problems, and that the administrative burden of providing voting opportunities to prisoners is diminished by use of absentee ballots. To Prof. Berman, voting engenders a desire to be involved and informed. Prof. Berman added that the voting right is not about punishment, but about a felon’s engagement with the laws to which he is subject.



Proposing a potential change to Section 4, Prof. Berman suggested that it might be amended to include an express provision allowing incarcerated felons to petition the governor to be re-enfranchised.

Discussion and Consideration

Upon discussion, the consensus of the committee is that Ohio's disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons.

Upon considering Prof. Berman's suggestion that the section be revised to include a provision allowing the governor authority to grant petitions to vote by incarcerated felons, the committee concludes that the review and/or modification of the governor's authority is not within the purview of this committee's charge. The committee further acknowledges the possibility that the broad scope of the governor's power to grant reprieves, commutations, and pardons under Article III, Section 11 may already encompass an ability to permit felon enfranchisement. Thus, the committee makes no recommendation in this regard.

Conclusion

The Bill of Rights and Voting Committee concludes that Article V, Section 4 should be retained in its current form.

Date Issued

After formal consideration by the Bill of Rights and Voting Committee on November 12, 2015, the committee voted to issue this report and recommendation on November 12, 2015.

Endnotes

¹ Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

² R.C. 2961.01, relating to civil rights of convicted felons, provides:

(A) (1) A person who pleads guilty to a felony under the laws of this or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned, unless the plea, verdict, or finding is reversed or annulled, is incompetent to be an elector or juror or to hold an office of honor, trust, or profit.



(2) When any person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit is granted parole, judicial release, or a conditional pardon or is released under a non-jail community control sanction or a post-release control sanction, the person is competent to be an elector during the period of community control, parole, post-release control, or release or until the conditions of the pardon have been performed or have transpired and is competent to be an elector thereafter following final discharge. The full pardon of a person who under division (A)(1) of this section is incompetent to be an elector or juror or to hold an office of honor, trust, or profit restores the rights and privileges so forfeited under division (A)(1) of this section, but a pardon shall not release the person from the costs of a conviction in this state, unless so specified.

(B) A person who pleads guilty to a felony under laws of this state or any other state or the United States and whose plea is accepted by the court or a person against whom a verdict or finding of guilt for committing a felony under any law of that type is returned is incompetent to circulate or serve as a witness for the signing of any declaration of candidacy and petition, voter registration application, or nominating, initiative, referendum, or recall petition.

(C) As used in this section:

(1) “Community control sanction” has the same meaning as in section 2929.01 of the Revised Code.

(2) “Non-jail community control sanction” means a community control sanction that is neither a term in a community-based correctional facility nor a term in a jail.

(3) “Post-release control” and “post-release control sanction” have the same meanings as in section 2967.01 of the Revised Code.

³ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Research Study No. 25, 2365 (Aug. 20, 1973), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Aug. 13, 2015).

⁴ Ohio Constitutional Revision Commission (1970-77), Vol. 5, Elective Franchise Recommendations, *supra*, at 2513 (Apr. 22, 1974).

For an in-depth discussion of the 1973 enactment of the Criminal Code, see Harry J. Lehman and Alan E. Norris, *Some Legislative History and Comments on Ohio’s New Criminal Code*, 23 Clev.St.L.Rev. 8 (1974).

⁵ Ohio Constitutional Revision Commission (1970-77), Volume 5, Elective Franchise Recommendations, *supra*, at 2513-16.

⁶ Ohio Constitutional Revision Commission (1970-77), Volume 5, Elections and Suffrage Committee Revision of Committee Recommendation, *supra* at 2586 (Sept. 19, 1974).

⁷ *Id.*

⁸ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Part 7, Elections and Suffrage, 21-22 (March 15, 1975), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Aug. 13, 2015).

See also Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Ohio Constitution, Vol. 11, Final Report, Index to Proceedings and Research, Appendix G, 264-65 (June 30, 1977), <http://www.lsc.ohio.gov/ocrc/final%20report%20index%20to%20proceedings%20and%20research.pdf> (last visited Sept. 16, 2015).



⁹ *Id.*

¹⁰ *Id.*

¹¹ *Grooms* was yet another case of vote-buying in Adams County, which had experienced a severe problem with the corrupt practice around the turn of the last century. As described by one author:

During Christmas week, 1910, Judge Albion Z. Blair and a grand jury revealed a state of affairs in this Ohio River county which shocked Ohio and the nation. For thirty years, the testimony disclosed, voters of every class and political affiliation – clergymen, physicians, prominent businessmen, as well as humble farm hands and the village poor – had been selling their votes to candidates for office of either party, whichever was willing to pay the price. When the grand jury completed its work in mid-January, 1911, 1,690 persons – all vote sellers – were indicted and pleaded guilty before Judge Blair. Since his purpose in initiating the probe had been to stop the practice rather than to exact a heavy punishment, his penalties were light. A typical sentence was a fine of twenty-five dollars, with all but five dollars remitted, a prison sentence of six months, at once suspended, and loss of voting rights for five years, which was absolute. The number disenfranchised totaled nearly a third of the voting population.

Hoyt Landon Warner, *Progressivism in Ohio 1897-1917*, 267-68 (1964).





OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE BILL OF RIGHTS AND VOTING COMMITTEE

OHIO CONSTITUTION ARTICLE V, SECTION 6

MENTAL CAPACITY TO VOTE

The Bill of Rights and Voting Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article V, Section 6 of the Ohio Constitution concerning the disenfranchisement of mentally incapacitated persons. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

Based on the following and for the reasons stated herein, the committee recommends that Article V, Section 6 in its current form be repealed, and that a new section be adopted as follows:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Background

Article V of the Ohio Constitution concerns the Elective Franchise.

Article V, Section 6 reads as follows:

No idiot, or insane person, shall be entitled to the privileges of an elector.

The clear purpose of the provision is to disqualify from voting persons who are mentally incapacitated. The provision modifies the broad enfranchisement of United States citizens over the age of 18 who otherwise meet the qualifications of an elector, as contained in Article V, Section 1.¹

When this provision was adopted as part of the 1851 Ohio Constitution, words such as “idiot,” “lunatic,” and “feeble-minded,” were commonly used to describe persons of diminished mental capacity. In modern times, however, the descriptors “idiot” and “insane person” have taken on a pejorative meaning and are not favored. Throughout the 1800s, an “idiot” was simply a person with diminished mental capacity, what later was termed “mental retardation,” and what is now referred to as being “developmentally disabled.” Further, the word “idiot” conveyed that it was a permanent state of mental incapacity, possibly congenital, as opposed to “mania” “dementia,” or “insanity,” which signified potentially transient or temporary conditions.² Today, the word “idiot” has become an insult, suggesting someone who is willfully foolish or uninformed.³

The use of both the word “idiot” and the phrase “insane person” in Article V, Section 6 suggests that the privileges of an elector were to be denied both to persons with permanently diminished mental capacity, as well as to persons whose condition is or could be temporary.

In one of the few cases discussing the meaning and origin of the words “idiot” and “insane persons” in this provision, the Marion County Common Pleas Court in 1968 observed:

From my review of legal literature going back to 1800 it seems apparent that the common definition of the word “idiot,” as understood in 1851 when our present Constitution was in the main adopted, meant that it refers to a person who has been without understanding from his nativity, and whom the law, therefore, presumes never likely to attain any. I am unable to find anything indicating any real change in this definition to this date. * * *

The words “insane person,” however, most commonly then as well as now, refer to a person who has suffered such a deprivation of reason that he is no longer capable of understanding and acting with discretion and judgment in the ordinary affairs of life. It seems quite apparent that some persons who once had normal reason and sense faculties become permanently insane. Others lose their normal perception and reason for relatively short periods of time such as day, a week, or a month or two, and then regain their normal condition for either their entire life or for some lesser indeterminate period. During these lucid intervals such persons commonly exercise every characteristic of normality associated with all those persons who have never, even for a short period, been deprived of their normal reasoning faculties.

Baker v. Keller, 15 Ohio Misc. 215, 229, 237 N.E.2d 629, 638 (Marion CP Ct. 1968).

Amendments, Proposed Amendments, and Other Review

Article V, Section 6 has not been amended since its adoption as part of the 1851 Ohio Constitution.

In the 1970s, the Elections and Suffrage Committee (“E&S Committee”) of the Ohio Constitutional Revision Commission (“1970s Commission”) discussed whether to amend the

provision in order to remove the “idiot” and “insane person” references. The E&S Committee’s discussion centered both on the words themselves, which were recognized as outdated and potentially offensive, as well as the provision’s vagueness:

The present provision concerning mental illness and voting is unsatisfactory for several reasons. First, the constitutional language is simply a direct prohibition. The General Assembly is not expressly given the power to determine which mental conditions are such that a person should not vote, nor to establish procedures for determining who does or who does not fall into the categories. Statutory authority for the courts to deny the vote to involuntarily committed patients is nevertheless provided in [Ohio Revised Code] section 5122.15, dealing with legal incompetency. But this provision carries out neither the letter nor the spirit of the constitutional prohibition. The law now tolerates the voting of some persons who may in fact be mentally incompetent. A voluntary patient who does not request a hearing before the probate court retains his civil rights, among them the right to vote. The loss of the right to vote is based upon the idea that a person in need of indeterminate hospitalization is also legally incompetent. But there are other persons whose right to vote may be challenged on the basis of insanity, either at the polls or in the case of contested election results. In these instances, there are no provisions resolving how hearings must be conducted, by whom, or even the crucial question of whether medical evidence shall be required. The lack of procedure for determining who is “insane” or an “idiot” could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.⁴

The E&S Committee acknowledged that “large scale and possibly arbitrary exclusion from voting are a greater danger to the democratic process than including some who may be mentally incompetent to vote.” The E&S Committee concluded that “a person should not be denied the right to vote because he is ‘incompetent,’ but only if he is incompetent for the purpose of voting,” ultimately recommending a revision that would exclude from the franchise persons who are “mentally incompetent for the purpose of voting.”⁵ The 1970s Commission voted to submit this recommendation to the General Assembly, specifically proposing repeal of the section and replacing it with a new Section 5 that would read:

The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.⁶

For reasons that are not clear, the General Assembly did not present this issue to the voters.

Litigation Involving the Provision

Only two Ohio Supreme Court cases refer to this provision. An early case, *Sinks v. Reese*, 19 Ohio St. 306 (1869), cited it to support a holding that some votes by mentally-impaired residents of an asylum could be disqualified; however, the court counted a vote by a resident who was “greatly enfeebled by age,” because “the reverence which is due to ‘the hoary head’ ought to have left his vote uncontested.” The court also mentioned the provision in *State ex rel. Melvin v. Sweeney, Secy. of State*, 154 Ohio St. 223, 94 N.E.2d 785 (1950), in which the court held constitutional a statutory provision that required county boards of elections to provide ballot assistance to physically disabled voters, but prohibited them from providing similar assistance to illiterate voters.

The provision also was cited in the context of an election in which a person of diminished mental capacity was alleged to have been improperly allowed to vote. *In re South Charleston Election Contest*, 1905 Ohio Misc. LEXIS 191, 3 Ohio N.P. (n.s.) 373 (Clark County Probate Court, 1905), involved a contested election relating to the sale of liquor in which one voter was deemed by the court to be mentally incompetent for the purpose of voting, with the result that the election was so close as to be declared null and void.

Baker v. Keller, supra, a common pleas case, cited Article V, Section 6 in relation to its conclusion that a litigant could not base a motion for new trial on the allegation that a mentally ill juror should have been disqualified where there had been no adjudication of incompetence.

More recently, a Maine federal court decision has been relied on in other jurisdictions for its holding that imposition of a guardianship for mental health reasons does not equate with mental incapacity for purposes of voting. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001), concluded that federal equal protection and due process guarantees require a specific finding that an individual is mentally incompetent for the purpose of voting before disqualification can occur. *Doe v. Rowe* was cited in *Bell v. Marinko*, 235 F. Supp.2d 772 (N.D. Ohio 2002), for the proposition that, because voting is a fundamental right, disenfranchisement based on residency requirements must be predicated on notice and an opportunity to be heard.

Presentations and Resources Considered

Michael Kirkman, Disability Rights Ohio

On December 11, 2014, Michael Kirkman, executive director of Disability Rights Ohio, a legal advocacy and rights protection organization, presented to the committee on the topic of voting rights for the disabled. Mr. Kirkman attended the committee meeting again on February 12, 2015, to provide additional assistance as the committee discussed potential changes to Article V, Section 6.

According to Mr. Kirkman, society’s perception of mental disability has changed since 1851, when neglect, isolation, and segregation were typical responses. Social reform after the Civil War helped create institutions for housing and treating the mentally ill, but there was little

improvement in societal views of mental illness. Mr. Kirkman noted that, even as medical and psychiatric knowledge expanded, the mentally ill were still living in deplorable conditions and were sometimes sterilized against their will. By the 1950s, there was a growing awareness that the disabled should be afforded greater rights, with the recognition that due process requirements must be met before their personal liberties and fundamental rights could be constrained. Mr. Kirkman observed that Article V, Section 1 gives broad basic eligibility requirements for being an Ohio voter, but Article V, Section 6 constitutes the only categorical exception in that it automatically disenfranchises people with mental disabilities. Mr. Kirkman further noted the difficulty in defining “mental incapacity for the purpose of voting,” commenting that mental capacity is not fixed in time or static in relation to every situation, and that even mental health experts have difficulty defining the concept. According to Mr. Kirkman, the better practice is to make an individualized determination of decisional capacity in the specific context in which it is challenged.

Mr. Kirkman emphasized the view of the disability community that full participation in the political process is essential, and for this reason he advocated removal of Article V, Section 6, without replacement. Alternately, if Article V, Section 6 cannot be entirely eliminated, Mr. Kirkman recommended the provision should be phrased as an affirmative statement of non-discrimination, such as “No person otherwise qualified to be an elector shall be denied any of the rights or privileges of an elector because of a disability.” He also stated that the self-enabling aspect of the current provision should be changed to reflect that the General Assembly has the authority to enact laws providing due process protection for persons whose capacity to vote is subject to challenge.

In his second appearance before the committee on February 12, 2015, Mr. Kirkman commented that the phrase “mentally incompetent to vote” is not currently favored when drafting legislative enactments. Instead, he said the mental health community favors expressing the concept as a lack of mental “capacity,” or as being “mentally incapacitated.” Mr. Kirkman noted that the word “incompetent” is a purely legal term used in guardianship and criminal codes, while “mental incapacity” more specifically describes the mental state that would affect whether a person could vote.

Mr. Kirkman again appeared before the committee on November 12, 2015 to answer questions from committee members about proposed changes to the provision. Reiterating that experts dispute what is meant by “capacity to vote,” Mr. Kirkman said one way to address that question would be to include language giving the General Assembly an express role in deciding what circumstances should affect voting rights.

Huhn Presentation

On November 12, 2015, the committee heard a presentation by Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio (“ACLU”). After describing the constitutional due process requirements relating to the right to vote, Professor Huhn advocated for removing Article V, Section 6, saying the General Assembly would still retain the ability to establish procedures for

denying the right to vote to persons who are incapable of voting. Prof. Huhn said mental health experts use methods to evaluate performance that are far more than a simple IQ test, and that people have abilities based on living skills, communication skills, and common sense.

Research Materials

The committee benefited from several memoranda that described relevant research, as well as posed questions for consideration and suggested possible changes to the section.

Staff research presented to the committee indicates that voting is a fundamental right that the United States Supreme Court calls the “essence of a democratic society.” *Reynolds v. Sims*, 377 U.S. 553, 555 (1964). “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). In addition, disenfranchisement is considered to be a denial of a fundamental liberty, subject to basic due process protections that ensure fundamental fairness. *Lassiter v. Dept. of Social Servs.*, 452 U.S. 18, 24 (1981). In reviewing provisions affecting the exercise of the elective franchise, courts apply the balancing test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), by which the individual’s interest in participating in the democratic process is weighed against the state’s interest in ensuring that those who vote understand the act of voting. *Dunn v. Blumstein*, 405 U.S. 330 (1972). Because voting is a fundamental right, the high court has held a state’s interest in limiting its exercise must be compelling, and the limitations themselves must be narrowly tailored to meet that compelling interest. *See, e.g., Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).⁷

The committee also reviewed other state constitutions that address disenfranchisement of the mentally impaired. Although nine states have no constitutional provision relating to a voter’s mental status, the remainder contain a limitation on voting rights for persons experiencing mental impairment, with three of those states having a provision that grants discretion to the state legislature to determine whether to disenfranchise. Significantly, only four states, Ohio, Kentucky, Mississippi, and New Mexico, retain the descriptors “idiots” and “insane persons,” with other states referring to such persons as being mentally incompetent, mentally incapacitated, or as having a mental disability.

Additional Resources

Research that assisted the Committee’s consideration of this issue included Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L.Rev. 931 (2007); James T. McHugh, *Idiots and Insane Persons: Electoral Exclusion and Democratic Values Within the Ohio Constitution*, 76 Albany L.Rev. 2189 (2013); Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, Disability Studies Quarterly, Vol. 22, No. 2, page 61; Kay Schriener & Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001).

Discussion and Consideration

In reviewing possible changes to Article V, Section 6, the committee first considered whether to simply replace the offensive references with more appropriate language, leaving the rest of the section intact. However, some members emphasized the importance of additionally stating that any disenfranchisement due to lack of mental capacity must last only during the period of incapacity.

The committee also discussed whether to retain the section's "self-executing" status, or whether to include language that would specifically authorize or require the General Assembly to create laws governing the disenfranchisement of mentally incapacitated persons. On this question, some members asserted that expressly requiring or empowering the General Assembly to act was unnecessary because this legislative authority is inherent. Ultimately, it was the consensus of the committee that expressly requiring or enabling action by the General Assembly is necessary in order to acknowledge an evolving understanding of the concept of "mental capacity for the purpose of voting," and so the committee concluded that the section should include such language.

The committee also addressed what would be the appropriate descriptor for persons whose mental disability would disqualify them from voting. On this question, the committee found persuasive Michael Kirkman's assertion that the preferred modern reference is to an individual's "incapacity," rather than to his or her "incompetence." Members of the committee agreed that "mental incapacity" would be an acceptable phrase to substitute for "idiots" and "insane persons." Combined with the committee's consensus that disenfranchisement should occur only during the time of the individual's incapacity, allowing voting to be restored to persons who recover their mental capacity, the committee concluded that the appropriate phrase should be "mental incapacity to vote."

The committee also considered the significance of the use of the phrase "privileges of an elector" in the section, as opposed to using the phrase "privileges of a voter" or "rights of a voter." One committee member noted that "privileges of an elector" would not indicate merely voting, but would include activities such as running for public office or signing a petition. Further discussion centered on the symbolic or other differences between using the word "privilege" and using the word "right," as well as the inclusion of the word "entitled" in the section. Some committee members expressed a strong preference for having the new section refer to voting as a "right," a word choice they believed would signify the importance of the act of voting, and emphasize the constitution's protection of the individual's voting prerogative. Other committee members were reluctant to change the reference to "privileges of an elector," because of the possibility that the original meaning and application of that phrase would be lost. Several members acknowledged that the "privilege versus right" controversy was larger than could be thoroughly addressed or satisfactorily resolved by the committee, and that, in any case, its resolution was not necessary to revising the section.

As a compromise, the committee agreed to recommend that the phrase read “rights and privileges of an elector,” so as to embrace both the concept of voting as a right and the concept, articulated in the original language of the section, of an “elector” having privileges beyond those of simply voting.

Debate arose over whether to include an explicit reference to judicial review, due process, or adjudication, as a prerequisite to disenfranchisement. Some committee members said they were inclined to exclude the reference based on their view that due process must be satisfied regardless of whether the provision expressly mentions the need for it. These committee members indicated that a constitutional provision that expressly requires adjudication could complicate or interfere with current procedures for ascertaining whether an individual is capable of voting. Other committee members said requiring adjudication would emphasize that the burden is on the state to prove that an individual’s mental state disqualifies him or her from voting, rather than the burden being on the individual to prove sufficient mental capacity to vote. Some members sought to include language that would emphasize that voting is a right that should not be removed absent adjudication. Those members expressed the view that a constitutional provision that doesn’t express this concept is not fair to the citizen.

The committee was divided between those who wanted to include a reference to adjudication, and those who did not. As a way of addressing the issue of adjudication, the committee decided the amendment should require the General Assembly to enact laws governing the legal determination of whether a person lacks the mental capacity to vote. The committee also agreed its recommendation should focus on substituting the references to “idiots” and “insane persons” with the adjective phrase “lacks the mental capacity to vote.” The committee further concluded that the provision could recognize both the “rights” and “privileges” of an elector, and that the disenfranchisement would only be during the period of incapacity.

The Bill of Rights and Voting Committee concluded that the considerations and interests supporting the change proposed by the 1970s Commission remain relevant today. Specifically, current knowledge regarding mental illness and cognitive impairment, as well as modern distaste for adjectives like “idiot,” continue to provide justification for amending this provision.⁸

Additionally, the current provision does not require that the subject individual be mentally incapacitated for the purposes of voting. The committee concluded that, without this specific element, the current provision lacks proper protection for persons asserted to be incapable of voting due to mental disability.

In addition to these considerations, the committee acknowledged the view that voting is a right, and that an individual possesses the “privileges of an elector,” which may include the ability to sign petitions or run for public office. Thus, the committee desired the new provision to signify that it is both of these potentially separate rights or interests that are infringed when a person is determined to lack mental capacity for the purpose of voting.

Conclusion

Based on these considerations, the Bill of Rights and Voting Committee recommends that Article V, Section 6 be repealed and replaced with the following new provision:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

The recommended amendment serves the goal of:

- Requiring the General Assembly to enact laws relating to the disenfranchisement of persons lacking the mental capacity to vote;
- Removing all outdated or pejorative references to mentally incapacitated persons;
- Specifying that the disenfranchisement only applies to the period of incapacity; and
- Requiring that only mental incapacity *for the purposes of voting* would result in disenfranchisement.

Date Issued

After considering this report and recommendation on September 10, 2015, November 12, 2015, and March 10, 2016, the Bill of Rights and Voting Committee, by a vote of six to one, voted to issue this report and recommendation on March 10, 2016.

Endnotes

¹ Article V, Section 1 provides:

Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote.

² Although the discipline of psychology was in its infancy in the 1800s, the Ohio Supreme Court's description of insanity in 1843 reflects a surprisingly modern view:

*** [I]t should be remembered that "insanity is a disease of the mind, which assumes as many and various forms as there are shades of difference in the human character. It exists in all imaginable varieties, and in such a manner as to render futile any attempt to give a classification of its numerous grades and degrees that would be of much service, or, under any circumstances, safe to be relied upon in judicial investigations. It is an undoubted fact, that, in determining a question of lunacy, the common sense of mankind must ultimately be relied on, and, in the decision, much assistance cannot be derived from metaphysical speculations, although a general knowledge of the faculties of the human mind, and their mode of operations, will be of great service in leading to correct conclusions. *Clark v. State*, 12 Ohio 483 (Ohio 1843), quoting Shelford on Lunacy, 38.

A full citation to “Shelford on Lunacy” is Leonard Shelford, *A Practical Treatise on The Law Concerning Lunatics, Idiots, and Persons of Unsound Mind, with an Appendix of The Statutes of England, Ireland, and Scotland, Relating to Such Persons and Precedents and Bills of Costs* (London, Wm. McDowall. 1833).

³ See Merriam Webster Dictionary, <http://www.merriam-webster.com/dictionary/idiot> (1. *usually offensive*: a person affected with extreme mental retardation; 2. a foolish or stupid person). For further discussion of 19th century scientific and political views on the subject of disenfranchisement of the mentally incompetent, see Kay Schriener, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 *Disability Stud. Q.*, no. 2, 2002, at 61; and Kay Schriener and Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 *Ohio St. L.J.* 481 (2001).

⁴ Ohio Constitutional Revision Commission (1970-77), Proceedings Research, Volume 5, Elections and Suffrage Committee Report, 2502, 2515 (Apr. 22, 1974), <http://www.lsc.ohio.gov/ocrc/v5%20pgs%20195-2601%20elections-suffrage%202602-2743%20local%20govt.pdf> (last visited Oct. 28, 2015).

⁵*Id.* at 2516.

⁶ Ohio Constitutional Revision Commission (1970-77), Recommendations for Amendments to the Constitution, Part 7, Elections and Suffrage, 23-25 (Mar. 15, 1975) <http://www.lsc.ohio.gov/ocrc/recommendations%20pt7%20elections%20and%20suffrage.pdf> (last visited Oct. 28, 2015).

⁷ A discussion of Due Process and Equal Protection jurisprudence related to state constitutional provisions that disenfranchise the mentally impaired may be found in Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 *N.Y.U. Ann. Surv. Am. L.* 87 (2009).

⁸ Since the 1970s, the General Assembly has undertaken efforts to purge the Ohio Revised Code of outdated or pejorative references to persons having diminished mental capacity, and to protect the civil rights of persons subject to guardianships. Thus, Am. Sub. H.B. 53, introduced and passed by the 127th General Assembly, removed all statutory references to “lunatic,” “idiot,” “imbecile,” “drunkard,” “deaf and dumb,” and “insane,” in 29 sections of the Revised Code, replacing them, where necessary, with more modern references.

Appendix 2

Bill of Rights and Voting Committee

Minutes of the Committee

Minutes of the Committee

NOTE: In the early years of the Commission, committee records were kept on an ad hoc basis by various individuals assisting the Commission. Unfortunately, this left committee records, in particular, in a haphazard state. After the hiring of permanent staff in 2014, committee records were regularly kept and put into a standardized format. In addition, staff revised early committee minutes, where available, to put them into the standardized format and to correct any errors or omission discovered during the process. Both the original and revised minutes have been retained with the full files of the Commission; however, the revised minutes have been endorsed as the official record of the committee and are the only documents included here.



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 9, 2013

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 11:30 a.m.

Members Present:

A quorum was present, with Chair Saphire and committee members Bell, Clyde, Cole, Gilbert, and Skindell in attendance.

Approval of Minutes:

This being the first meeting of the committee, there were no minutes to approve.

Discussion:

Chair Saphire asked committee members about meeting prior to the official June meeting. Questions were addressed.

Chair Saphire asked about creating and adopting committee rules.

Chair Saphire talked about how to research different sections of the Ohio Constitution. Committee member Karla Bell noted some research has already been done.

Chair Saphire opened the floor to committee members for ideas about how the committee might proceed. Senator Mike Skindell suggested extending invitations to law professors who could present on different issues regarding the Ohio Constitution and the Bill of Rights.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:53 a.m.

Approval:

The minutes of the May 9, 2013 meeting of the Bill of Rights and Voting Committee were approved at the July 10, 2013 meeting of the committee.

/s/ Richard Saphire

Richard Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
WEDNESDAY, JULY 10, 2013

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 12:09 p.m.

Members Present:

A quorum was present, with Chair Saphire, Vice-chair French, and committee members Amstutz, Clyde, Fischer, Gilbert, and Skindell in attendance.

Approval of Minutes:

The minutes of the May 9, 2013 meeting of the committee were approved.

Discussion:

Chair Saphire recognized Senior Policy Advisor Steven H. Steinglass to speak to the committee. Mr. Steinglass outlined the documents he submitted to the committee for their review. Mr. Steinglass proceeded to discuss judicial interpretation of the Ohio Constitution, Article I, Sections 1 through 21, and Article II, Section 8. Throughout the presentation, members of the committee discussed the substance of each section mentioned.

Chair Saphire raised the topic of how the committee should proceed with regard to allowing public participation. Chair Saphire suggested three potential methods: 1) proceeding without public comment for the time being; 2) only proceeding once public comment is completed; or 3) a dual track that would allow for public comment while the committee continues to work on subjects that may not have public comment readily available. In discussing the question, committee members agreed the third option was best. Vice-chair Judith French suggested the committee could work first on issues on which the public is less likely to offer comment.

Committee member Ed Gilbert suggested that Chair Saphire and Vice-chair French draft a list of potential topics the committee could work on before receiving public comment.

Chair Saphire raised the question of whether the committee should meet in August or September. Vice-chair French suggested she and Chair Saphire could propose to the Commission by August a process for moving forward with regard to public comment. The committee agreed not to meet until September, after a process is set up.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 2:25 p.m.

Approval:

The minutes of the July 10, 2013 meeting of the Bill of Rights and Voting Committee were approved at the September 12, 2013 meeting of the committee.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 12, 2013

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:07 a.m.

Members Present:

A quorum was present, with Chair Saphire, and committee members Amstutz, Clyde, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the July 10, 2013 meeting of the committee were approved.

Discussion:

Chair Saphire recognized Senior Policy Advisor Steven H. Steinglass, who presented on the history of voting rights in Ohio. Mr. Steinglass referenced race, property ownership, and gender as early impediments to voting in Ohio, and explained how each impediment was overcome over time. Mr. Steinglass then outlined Articles V and XVII of the Ohio Constitution, which concern the elective franchise and elections. Throughout his presentation, committee members discussed the substance of each article and section. Discussion generally revolved around which sections of Articles V and XVII had the most potential for change through a constitutional amendment.

Chair Saphire called Representative Alicia Reece to testify before the committee. Rep. Reece presented a proposal for a constitutional amendment that would establish a Voter Bill of Rights. Rep. Reece argued the necessity of establishing constitutional rights for Ohio voters. Discussion between committee members and Rep. Reece ensued about various details of the proposal.

Chair Saphire noted the committee would be addressing a “roadmap” for future committee meetings at a future meeting.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:20 a.m.

Approval:

The minutes of the September 12, 2013 meeting of the Bill of Rights and Voting Committee were approved at the October 10, 2013 meeting of the committee.

/s/ Richard Saphire

Richard Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, OCTOBER 10, 2013

Call to Order:

Vice-chair Judith French called the meeting of the Bill of Rights and Voting Committee to order at 12:40 p.m.

Members Present:

A quorum was present, with Vice-chair French, and committee members Amstutz, Bell, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the September 12, 2013 meeting of the committee were approved.

Discussion:

Vice-chair French led a review of the proposed “road map,” or plan, to guide the committee's deliberations for the coming months. Discussion pertained to the establishment of anticipated timelines for each topic that the committee will consider. All subjects for potential discussion were divided into a set of tiers. Tier I topics are provisions that appear to be non-controversial and so may not require receipt of testimony. Tier II topics are provisions that appear to require some reflection and possible explanation or revision, and may require one or more meetings for review and testimony. Tier III topics are provisions that already appear to have proponents for change, and will require more than one meeting for review and testimony. Tier IV topics are provisions that are general or aspirational in nature, and each will require thoughtful reflection and possible redrafting. The committee decided that it would consider additional provisions that are not already included in the current Ohio Constitution after all tiers are discussed. After all tiers and additional provisions have been discussed, the committee will conclude by drafting a final report.

The committee engaged in additional discussion related to methods for seeking and encouraging public testimony. The committee also affirmed the need for flexibility as additional topics and different timeframes become apparent.

Senator Mike Skindell motioned to approve the “road map” and Representative Ron Amstutz seconded the motion. Without objection, the “road map” was approved.

The committee decided that the first subject for deliberation would be a review and comparison of what other states and Ohio have in their state constitutions with regard to Bill of Rights and voting issues.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 1:20 p.m.

Approval:

The minutes of the October 10, 2013 meeting of the Bill of Rights and Voting Committee were approved at the November 14, 2013 meeting of the committee.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 14, 2013

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:09 a.m.

Members Present:

A quorum was present, with Chair Saphire, Vice-chair French, and committee members Amstutz, Clyde, Cole, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the October 10, 2013 meeting of the committee were approved.

Presentations and Discussion:

Chair Saphire introduced Professor Edward B. Foley of the Ohio State University Moritz College of Law, who presented on the voting rights provisions in the Ohio Constitution. Prof. Foley explained why he believed fairness and impartiality were the most important rules for the voting rights provisions in the Ohio Constitution. Committee members asked questions and discussed various issues they thought might contribute to fairness and impartiality with regard to voting rights in the Ohio Constitution.

Chair Saphire introduced the committee's second speaker, Representative Alicia Reece. Rep. Reece presented her ideas for a potential "Voter Bill of Rights" within the Ohio Constitution. Committee members asked questions and discussed the benefits of and issues that may arise from including a "Voter Bill of Rights" in the Ohio Constitution.

Adjournment:

With no further business to come before the committee, the meeting adjourned.

Approval:

The minutes of the November 14, 2013 meeting of the Bill of Rights and Voting Committee were approved at the February 13, 2014 meeting of the committee.

/s/ Richard Saphire

Richard Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 13, 2014

Call to Order:

Vice-chair Jeff Jacobson called the meeting of the Bill of Rights and Voting Committee to order at 12:35 p.m.

Members Present:

A quorum was present, with Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the October 10, 2013 meeting of the committee were approved.

Presentation and Discussion:

Vice-chair Jacobson introduced the first presenter, John Dinan, professor of Political Science at Wake Forest University. Professor Dinan outlined and discussed various trends in reforms and revisions of states' bills of rights and constitutional voting rights provisions, including: 1) removal of outdated and archaic language; 2) recognition of rights having no counterpart at the federal constitutional level; 3) addition of rights that are more definitive and that clarify those created at the federal level (such as privacy); and 4) addition of more definitive and clearer rights that are responses to state court interpretations and rulings. Questions and discussions occurred during and after the presentation.

A discussion then occurred regarding the committee's "road map" and a February 5, 2014 memo from Chair Sapphire dealing with the committee's agenda. Specifically, the committee discussed the protocol for disposing of the various levels of topics, or tiers, the potential for notice and input of the public, and how to make recommendations.

Adjournment:

With no further business to come before the committee, the meeting adjourned.

Approval:

The minutes of the February 13, 2014 meeting of the Bill of Rights and Voting Committee were approved.

/s/ Richard Saphire

Richard Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 13, 2014

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 3:05 p.m.

Members Present:

A quorum was not present, with Chair Saphire, and committee members Bell, Peterson, and Skindell in attendance.

Approval of Minutes:

There being no quorum, the minutes of the February 13, 2014 meeting of the committee were not approved.

Discussion:

The committee discussed procedure and protocol in addressing, disposing of, and making recommendations on various constitutional provisions. Issues related to public notice and posting on the Commission web site were also discussed.

Although no formal votes were taken or recommendations adopted, there was consensus that the degrees of formality regarding public input would depend on the amount of complexity and potential controversy of the provisions being discussed. Committee members agreed that Tier I topics, which are least controversial, would be less formal in relation to public input at meetings, while Tier III, involving more controversial topics, being more formal. Committee members also expressed that public notice should be posted on the Commission's website, denoting the constitutional provisions that will be addressed at an upcoming meeting with the respective title

and description. Committee members also agreed notice should be given on the website for an upcoming meeting if there may be a potential vote for a recommendation on a provision.

Various methods of disposition of constitutional provisions that are obsolete, archaic, or preempted by federal action, such as by United States Supreme Court rulings, also were discussed. Chair Sapphire expressed the need for uniformity and consensus between the various subject matter committees in making recommendations to the full Commission. Senator Mike Skindell suggested patterning the public notices after the committee notices given for Senate committee hearings, such as using titles and descriptions of the subject matter, and indicating that potential action may be taken.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 3:38 p.m.

Approval:

The minutes of the March 13, 2014 meeting of the Bill of Rights and Voting Committee were approved at the April 10, 2014 meeting of the committee.

/s/ Richard Sapphire
Richard Sapphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, APRIL 10, 2014

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 12:37 p.m.

Members Present:

A quorum was present, with Chair Saphire, Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

There being no quorum, the minutes of the February 13, 2014 meeting of the committee were not approved.

Discussion:

A discussion took place regarding procedure and protocol for disposition of issues and public input. Senator Mike Skindell moved for the following procedure: a constitutional provision will be posted online as a notice for the agenda; the provision will be discussed at the first meeting; after the discussion, a vote will take place on the preliminary recommendation for the particular provision; the provision and preliminary recommendation will be posted on the website for public input and discussion at the subsequent second meeting; and a vote for recommendation to the full Commission will take place at the second meeting (adoption or rejection of the recommendation). The motion was seconded and approved with one objection by Mr. Jacobson.

The committee then considered a series of motions for a preliminary recommendation relating to various constitutional provisions. A motion was made and seconded for a preliminary recommendation to repeal Article V, Section 8, relating to term limits for United States Senators

and Representatives, as clean-up process, which motion was seconded. The motion passed with the following vote:

Saphire – aye
Amstutz – aye
Bell – aye
Peterson – aye
Skindell – aye
Jacobson – nay
Clyde – nay
Fischer – nay
Gilbert – abstained

Committee member Ed Gilbert moved for a preliminary recommendation to amend the provision by affirmatively stating that there are no term limits for these federal offices. There was no second.

The committee then considered motions for a preliminary recommendation to retain the language in the following provisions: Article I, Section 2 (Right to Alter, Reform or Abolish Government, and Repeal Special Privileges); Article I, Section 6 (Slavery and Involuntary Servitude); Article I, Section 13 (Quartering Troops); Article I, Section 17 (Hereditary Privileges); and Article I, Section 20 (Powers Reserved to the People). These motions were seconded and unanimously approved.

The committee then discussed procedure and public notification for other constitutional issues that are more complex and may be more controversial. The need for notification and for inviting professionals and experts to speak on these provisions was discussed. Specifically, committee members noted a need for input regarding Article I, Section 21 (Preservation of the Freedom to Choose Health Care and Health Care Coverage).

Adjournment:

With no further business to come before the committee, the meeting adjourned at 1:45 p.m.

Approval:

The minutes of the April 10, 2014 meeting of the Bill of Rights and Voting Committee were approved.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 8, 2014

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order.

Members Present:

A quorum was present, with Chair Saphire and committee members Amstutz, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the previous meeting were approved.

Discussion:

The Committee considered, for the second time, proposals concerning those provisions of the Ohio Constitution listed in Tier 1 of the roadmap previously adopted by the committee. The provisions considered, and the votes taken, were as follows:

Votes taken: The Committee voted to recommend to the Commission that:

- Article V, Section 8 of the Ohio Constitution, pertaining to Term Limits for U.S. Senators and Representatives, be retained in its current wording.
- Article I, Section 2, pertaining to the Rights to Alter, Reform, or abolish Government, and Repeal Special Privileges, be retained in its current wording.
- Article I, Section 6, pertaining to Slavery and Involuntary Servitude, be retained in its current wording.
- Article I, Section 13, pertaining to Quartering Troops, be retained in its current wording.

- Article I, Section 17, pertaining to Hereditary Privileges, be retained in its current wording.
- Article I, Section 20, pertaining to Powers Reserved to the People, be retained in its current wording.

Since all of the above proposals, with the exception of Article V, Section 8, were re-approved after a second consideration, those proposals will be forwarded to the full Commission for consideration. However, the committee's vote on Article V, Section 8 represented a reversal of the vote taken at its April meeting. Therefore, Article V, Section 8 will once again be placed on the committee's agenda at its June meeting for further consideration.

The committee also considered for the first time the following provisions:

- Article I, Section 3, pertaining to the Right to Assemble and Petition.
- Article I, Section 4, pertaining to the Right to Bear Arms.
- Article V, Section 2, pertaining to the requirement that all elections be held by ballot.

The committee voted to retain Article 1, Section 3 and 4 in their current wording. With respect to Article V, Section 2, the committee discussed whether, as written, the provision might be construed to prohibit or restrict the General Assembly, or other responsible state officials, from either requiring or permitting electronic voting in Ohio. The committee agreed not to vote on the provision at this time, but to conduct research into this matter and to place Article V, Section 2 on the agenda for its June meeting for further consideration

Adjournment:

With no further business to come before the committee, the meeting adjourned.

Approval:

The minutes of the May 8, 2014 meeting of the Bill of Rights and Voting Committee were approved at the September 11, 2014 meeting of the committee.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 12, 2014

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order.

Members Present:

A quorum was present.

Approval of Minutes:

The minutes of the previous meeting were approved.

Discussion:

The committee voted to retain Article I, Section 3 of the Ohio Constitution, pertaining to the Right to Assemble and Petition, in its current form, with no changes. Since this was the second time that retention of this provision has been agreed to by the committee, the recommendation will be forwarded to the full Commission.

The committee next considered Article I, Section 4 pertaining to the Right to Bear Arms. At its May meeting, the committee had voted to recommend retention of this provision in its current form. After considerable discussion, the committee agreed that it might benefit from a detailed comparative analysis of similar provisions from other states' constitutions, and therefore decided to postpone further consideration of this provision to a later time. The committee will seek to obtain further legal research into this matter.

The committee next considered Article V, Section 2, pertaining to the requirement that elections be held by ballot. The committee discussed the question whether and how this provision might apply to current or future efforts by the State of Ohio to conduct elections through electronic

means. Based upon its research of this provision, the committee agreed that this provision has been, and would most likely continue to be, interpreted by the courts as sufficiently flexible so as to give election officials and the General Assembly the flexibility they might require to administer future elections. Accordingly, the committee voted to recommend that this provision be retained in its current form. Pursuant to the process previously approved by the committee, this provision will be considered again at its July meeting.

The committee also considered Article V, Section 8, which at its last meeting the committee voted to retain in its current form. After considerable discussion, the committee agreed to postpone further consideration of this provision until a later time.

Next, the committee considered Article V, Section 2a of the Ohio Constitution, pertaining to the Names of Candidates on the Ballot. After discussion, the committee voted to recommend the retention of this provision in its current form. This provision will be considered for a second time at the committee's July meeting.

Finally, the committee began its consideration of Article V, Section 7. The Committee discussed recent court decisions interpreting the provision's requirement that "[a]ll nominations for elective state, district, county and municipal offices shall be made at direct primary elections or by petition as provided by law * * *." First, the committee discussed whether the provision should be changed so that it explicitly applied to federal as well as state offices. Second, the committee discussed whether the second major clause of the provision, pertaining to "a preferential vote for United States senator" was obsolete and should therefore be deleted. Finally, the committee believed that further study was necessary to determine the proper meaning of the requirement that certain nominations for elective office be made by primary and others through "petition as provided by law." The committee agreed that the chair should contact the offices of the Ohio Secretary of State and Attorney General, as well as others, to solicit additional views on these questions.

Adjournment:

With no further business to come before the committee, the meeting adjourned.

Approval:

The minutes of the June 12, 2014 meeting of the Bill of Rights and Voting Committee were approved at the September 11, 2014 meeting of the committee.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REVISED MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JULY 10, 2014

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order.

Members Present:

A quorum was present.

Approval of Minutes:

The minutes of the previous meeting were approved.

Discussion:

The committee deferred to its next meeting further consideration of Article I, Section 4 pertaining to the Right to Bear Arms. At its May meeting, the committee had voted to recommend retention of this provision in its current form. The Committee expressed its appreciation to legislative aide Chris Smith for preparing a detailed comparative analysis of similar provisions from other states' constitutions.

The committee considered Article V, Section 2, pertaining to the requirement that elections be held by ballot. At its May meeting, the Committee voted to recommend that this provision be retained in its current form. After brief discussion, the committee once again voted to retain this provision in its current form, and to forward this recommendation to the commission.

The committee next considered Article V, Section 2a, pertaining to the Names of Candidates on the Ballot. At its May meeting, the committee voted to recommend the retention of this provision in its current form. After brief discussion, the committee again voted to retain this provision in its current form, and to forward this recommendation to the Commission.

The Committee next considered Article V, Section 7, pertaining to Primary Elections. With respect to this provision, the committee took the following action:

- The committee voted to delete the following language from the first sentence of this provision: “*and provision shall be made by law for a preferential vote for the United States Senator.*” The committee concluded that this language was rendered superfluous by the adoption of the Seventeenth Amendment of the United States Constitution, after which United States Senators were chosen by direct election of the people of Ohio.
- The committee considered the question whether the first sentence of the provision should be amended to include nominations to *federal* office among the nominations that “shall be made by direct primary or elections or by petition as provided by law.” Members of the committee could see no apparent reason for not recommending such an amendment, but took no vote on this issue. This matter will be referred to the Commission’s counsel for further research and consideration.
- The committee next resumed discussion from its May meeting of the provision’s requirement that all nominations for elective state, district, county and municipal offices “shall be made at direct primary elections or by petition as provided by law * * *.” In light of relevant court decisions, the committee believed that further study was necessary to determine the proper meaning of the requirement that certain nominations for elective office be made by primary and others through “petition as provided by law.” The committee decided to refer this matter to the Commission’s counsel for further research and consideration.
- Finally, the committee considered the last two sentences in Article V, Section 7, pertaining to the selection of delegates to national political conventions. While committee members expressed no concerns with respect to the substance of these sentences, there was discussion about whether the use of the male pronoun (“his”) in the last sentence to describe the delegate to which the sentence refers was appropriate, and whether the sentence could be modified to delete that use. The chair agreed to inquire whether the Commission had already undertaken a process to address the constitution’s use of gender-specific pronouns.

The committee next turned to Article V, Section 4, which pertains to Exclusion From the Franchise. After brief discussion, the committee voted to retain this provision in its current form and place it on the agenda of the next meeting for a second consideration.

The committee next considered Article V, Section 6, pertaining to Idiots or Insane Persons. A number of committee members expressed reservations concerning the use of the term “idiots” in this provision. It was agreed that this provision should be referred to the Commission’s counsel for research and consideration.

Finally, the Committee noted that, per agreement with the chair of the Legislative Branch and Executive Branch Committee, the chair had agreed to cede responsibility for Article V, Section 9

to that committee. It is also noted that responsibility for Article V, Section 8 has been ceded to that committee.

The Committee agreed that it would not meet in August.

Adjournment:

With no further business to come before the committee, the meeting adjourned.

Approval:

The minutes of the July 10, 2014 meeting of the Bill of Rights and Voting Committee were approved at the September 11, 2014 meeting of the committee.

/s/ Richard Saphire
Richard Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 11, 2014

Call to Order:

Chairman Sapphire called to order the meeting of the Bill of Rights and Voting Committee at 2:30 p.m.

Members Present:

A quorum was present with committee members Sapphire, Bell, Clyde, Cole, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The committee approved the minutes of the July 10, 2014 meeting.

Topics Discussed:

Article I, Section 7 (Rights of Conscience; Education; the Necessity of Religion and Knowledge)

Chairman Sapphire indicated that discussion regarding Article I, Section 7 would be deferred until a later date.

Article V, Section 4 (Exclusion from Franchise)

Chairman Sapphire stated that Professor Berman would be speaking to this topic at the next committee meeting.

Article I, Sections 21 and 19 (Preservation of the Freedom to Choose Health Care; Eminent Domain)

Chairman Sapphire stated discussion regarding Article I, Sections 19 and 21 would take place at a later date, once background questions could be researched.

Article I, Section 4 (Bearing Arms; Standing Armies; Military Powers)

As a follow up to the committee's prior discussion regarding the right to bear arms and the prohibition on standing armies, the committee discussed retaining the current language as set out in this section. As part of its discussion, the committee reviewed a 50 state survey on the topic. Following discussion, a motion was made to retain Article I, Section 4, in its current form. The motion was seconded and approved.

Article V, Section 6 (Idiots or Insane Persons)

Committee member Karla Bell took the lead in discussing this issue. She noted that the words used in the provision have no contextual meaning and may be constitutionally suspect for being vague and ambiguous. She also indicated that there is no provision in the Revised Code allowing for adjudication for the purposes of voting. Finally, she noted that she spoke with a magistrate in the Cuyahoga County Court of Common Pleas, Probate Division, who said there is no procedure for adjudicating this issue and that a guardianship does not contain an automatic loss of the right to vote.

A question was asked as to what a repeal of Section 6 would do if there were no replacement. Counsel Shari O'Neill answered that there are provisions in the Revised Code dealing with the issue and that there are states lacking a constitutional provision that, nevertheless, disenfranchise mentally incompetent persons via statute. One committee member noted that eliminating Section 6 would create a problem in that Section 1 indicates that everyone 18 years of age or older can vote, meaning that any statute that eliminates the franchise for a mentally incompetent person would be unconstitutional under Section 1 if there were no Section 6 prohibition.

Bell noted a Maine case, *Doe v. Rowe*, 156 F.Supp.2d 35 (D.Me. 2001), which O'Neill explained is frequently cited for the notion that a guardianship, standing alone and without an adjudication that the ward is incompetent for the purposes of voting, does not comply with due process principles and therefore is constitutionally infirm.

The committee discussed whether a revised provision should include a right to counsel, and whether the lack of such language caused due process issues. The committee also discussed whether the burden of proof should be by the preponderance of the evidence or whether it should be by clear and convincing evidence. Some committee members expressed that the inclusion of these items may create problems if included.

The committee wondered whether or how often the issue of mentally incompetent voters is raised with the board of elections. Peg Rosenfield, elections specialist with the League of Women Voters, a member of the audience, said that when she was with the board of elections they had very few requests for voters to be removed from the rolls for mental incompetence, and that the issue came up in dementia situations in which family members reluctantly tried to prevent a loved one from voting.

A committee member expressed concern that a constitutional provision relating to disenfranchising mentally incompetent persons could be used to disenfranchise those who are not actually incompetent but whose votes a group may want to exclude.

Chair Sapphire requested that Bell and O'Neill work together to come up with additional options for revising the section to be presented and discussed at the next committee meeting.

Adjournment:

With no further business, the committee adjourned at 3:47 PM.

Attachments:

- Notice
- Agenda
- Roll call sheet
- O'Neill memorandum re: Article V, Section 6
- Survey on Right to Bear Arms constitutional provisions in other states

Approval:

These minutes of the September 11, 2014 meeting of the Bill of Rights and Voting Committee were approved at the December 11, 2014 meeting of the committee.

/s/ Richard B. Sapphire

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, OCTOBER 9, 2014

Call to Order:

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 10:13 a.m.

Members Present:

Committee members Sapphire, Jacobson, Amstutz, Fischer, and Peterson were in attendance. A quorum was not present.

Approval of Minutes:

Minutes of the July 10, 2014 meeting were not approved due to lack of a quorum. The minutes will be presented at the next committee meeting.

Topics Discussed:

Article V, Section 4 (Exclusion from Franchise)

Douglas A. Berman, Professor of Law at the Ohio State University Moritz College of Law presented on the topic of felony disenfranchisement. He began his presentation with a quote by United States Attorney General Eric Holder: "The right to vote is the single most basic right of American citizenship."

Ohio is recognized as one of the few states that allow felons to vote once they have been released. Prof. Berman indicated that felons who are re-enfranchised are less likely to commit additional crimes: they will invest in society's laws.

When asked if there is any data to suggest that people who are subjected to felony disenfranchisement and have their vote restored will vote at a higher rate Prof. Berman

responded there is not much evidence, but it appears about the same rate as their socioeconomic cohorts.

Prof. Berman suggested that rather than altering the current language, perhaps there should be an express provision to give the governor the right to re-enfranchise felons under a specific provision that would state those disenfranchised by laws by the General Assembly may have the right to petition the governor for re-enfranchisement.

When asked if there is any evidence to indicate that the longer a felon is in prison the less likely he is to vote again Prof. Berman replied there are thousands who are imprisoned for decades or more. He indicated there is a skew in racial dynamics with only 0.6% of Ohio's entire voting population being disenfranchised by having a current felony sentence, but that the rate is four times higher for African Americans where 2.4% of all voting age Ohioans of this racial category are disenfranchised by having a felony conviction. Approximately 25,000 of the 50,000 prison population in Ohio is African American.

Prof. Berman stated that he believes voting is a right, privilege, and responsibility, and we should have a strong rationale before taking it away.

When asked if there are any crimes that would permanently disenfranchise their perpetrators, Prof. Berman replied that crimes that go against the election process should be considered for such disenfranchisement.

Prof. Berman went on to say that removing the right of citizenship has a primitive aspect. This is a topic of conversation because disenfranchisement is seen as a symbol of the opportunity to prevent re-entry into society for a certain population. He indicated he doesn't support losing the right to vote. Enfranchisement sends a message regarding democracy and the importance we place on voting.

When asked if he would enfranchise persons in prison, Prof. Berman stated that thinks that should be the norm. He reported that Maine and Vermont allow for this and have reported no problems. He also noted that the administrative burden is diminished by use of absentee ballot. He also added that voting engenders a desire to be involved and informed.

Prof. Berman was then asked a question about allowing the following three hypothetical prisoners to vote.

- A domestic terrorist who murders dozens of people
- A serial child rapist
- A judge who takes bribes

Prof. Berman replied that allowing a domestic terrorist to have the right to vote sends a message that change is affected by voting, not terrorism. He added that we are eager to punish these crimes with the thought that punishment also deters others, but added that the prisoner's ability to get involved in the process may change them. The voting right is not about punishment, but about a felon's engagement with the laws he is subject to. He went on to add that the ultimate

loss of rights comes with the death penalty. Those on death row could be excluded from voting. There may be some other crimes so horrific you have no more rights.

Prof. Berman replied he has not had a chance to research, but those states have made no attempt to change their laws, although they have debated the use of absentee ballots.

Chairman Richard Saphire commented he likes the idea of the governor having authority to lift the ban and wondered if there are any other states with this type of provision. Prof. Berman responded he was not aware of any, but noted that governors do have the power of general pardon.

Chairman Richard Saphire asked Commission Counsel Shari O'Neill to research existing power of the governor and if he could entertain a request for a prisoner to be allowed to vote under his current constitutional powers.

When asked if he had any comment regarding a convicted felon's eligibility for public office, Prof. Berman noted this was justifiably subject to legislative restriction and that he is comfortable with restricting running for office. See R.C. 2961.01.

Peg Rosenfield, an Elections Specialist for the League of Women Voters of Ohio and a member of the audience observing the meeting, commented that in 1980 the Secretary of State arranged a rehabilitation release procedure, to provide felons leaving prison the opportunity to re-register to vote. The registration would be sent to the Secretary of State's office, which then forwarded it to the city/county with the date of release. She stated she is not sure if this is still done. She asked if there was an effort to re-enfranchise felons once they were released, and wondered whether the Ohio Department of Rehabilitation and Correction still use that policy/procedure.

Article V, Section 6 (Idiots or Insane Persons)

Chair Saphire informed the committee that Michael Kirkman from Disability Rights Ohio would be invited to attend the next committee meeting to discuss Article V, Section 6.

Adjournment:

With no further business, the committee adjourned at 3:47 PM.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Sentencing Project Primer on felony disenfranchisement
- Shadow Report on the prevalence and impact of felony disenfranchisement laws
- O'Neill memorandum re: Article V, Section 4
- O'Neill memorandum re: Article V, Section 6
- Bell memorandum re: Article V, Section 6

Approval:

These minutes of the October 9, 2014 meeting of the Bill of Rights and Voting Committee were approved at the December 11, 2014 meeting of the committee.

/s/ Richard B. Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 11, 2014

Call to Order:

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 10:13 a.m.

Members Present:

Committee members Sapphire, Jacobson, Amstutz, Bell, Clyde, Cole, Fischer, Gilbert, and Peterson were in attendance.

Approval of Minutes:

The committee approved the minutes of the October 9, 2014 meeting.

Topics Discussed:

Article V, Section 6 (Idiots and Insane Persons)

Michael Kirkman, Executive Director of Disability Rights Ohio, presented to the committee on the topic of voting rights for the disabled.

Mr. Kirkman began by describing how society's perception of people with disabilities has changed since 1851. At that time neglect, isolation, and segregation were typical responses to mental illness. After the Civil War, surgeons from the war started to consider mental illness and their views began to evolve. He noted that many advances were made in this area, accompanied by some setbacks. He mentioned Dorothea Dix, a social reformer during the 1800s, who had a philosophy that putting the mentally ill on farms and giving them work would help them. She was correct and this model is still used in Europe today. However, as the populations of these institutions grew, they became horrific places. Then, Mr. Kirkman noted that in the 1960s, the civil rights movement helped to improve the institutions, making them humane places. Sometimes this meant de-institutionalization, which had its own problems.

Mr. Kirkman noted that his organization has filed law suits on behalf of the mentally ill to get help for them and has obtained consent decrees to improve their conditions.

He added that, as medical and psychiatric knowledge expanded, the mentally ill were still living in horrible conditions and were sometimes sterilized against their will. At times, people were treated as if they were mentally deficient when they were merely poor. There was a convergence of disability, gender, and race, with a label of insanity or imbecility as a way to deal with people who were different.

He also observed that in the 1960s and 1970s professionals changed how they viewed mental illness, and awareness grew that people should be treated as individuals, with an expectation that people with disabilities should be treated as full citizens. This new approach emphasized nondiscrimination, integration, and full inclusion, rather than stereotypes.

In reviewing Ohio law, Mr. Kirkman said the current system is disjointed. While Article V, Section 1 gives broad basic eligibility requirements for being an Ohio voter, Article V, Section 6 constitutes the only categorical exception in that it disenfranchises people with mental disabilities. Under Article V, Section 4, felons are treated better than people with mental disabilities, since their rights are automatically restored after they are no longer incarcerated.

Regarding statutory law, Mr. Kirkman is still researching the provisions and procedures, but has found that a voter's registration is cancelled under mental health laws if the voter is found incompetent to vote. However, there is no case law on this because people don't bring law suits. If people seem to have the ability to vote, poll workers do not question them. Despite anecdotal stories, there is no evidence of large numbers of mentally incompetent nursing home residents being brought to the polls.

Chair Sapphire asked whether the rule is that as long as they can register, they can vote. Mr. Kirkman responded in the affirmative, indicating that if someone clearly is in a coma, a poll worker would challenge, but those people are not brought to the polls.

Committee member Bell stated that the information given to poll workers is not to look out for people who seem mentally incompetent. Theoretically, there is an opportunity to disqualify under the adjudication procedure, but in reality that doesn't occur.

Mr. Kirkman responded that probate courts do not send a list of incompetents to the county board of elections, and said relying on probate courts to handle the problem is not a solution.

Chair Sapphire commented "we have a constitutional provision that excludes a class of persons, we can't tell from language of the constitution what effect the provision has in the real world, no coherent statutory scheme, and few consistent rules, so does that mean we have a provision that is only on paper, no effect on real world?" Michael Kirkman said broadly speaking this is correct.

Chair Sapphire, observing that Mr. Kirkman's recommendation is to repeal Article V, Section 6, asked why repeal is necessary if the provision is not being used; maybe it would be enough simply to change the objectionable language. Mr. Kirkman pointed out that, in its current form,

the constitutional provision is unconstitutional under the U.S. Constitution. He also indicated that if the constitution should reflect the values of our society, and to be a leader in what the values should be, there shouldn't be discriminatory language in our constitution. He pointed out that using guardianship as a surrogate for disqualification doesn't work. He noted that some of this is aspirational, because respecting where we are with federal law and as a society, this language must come out.

Committee member Cole indicated that he views the debate as being between two potential paradigms, one that advocates that there is a group that should not be able to vote but is difficult to define, and the other being that the group should be permitted access to the ballot no matter how defined.

Mr. Kirkman said it is not clear what it means to say "not mentally incompetent to vote," since even mental health professionals have difficulty defining that. Mr. Kirkman indicated he would go further and have a policy that if someone shows up at the polls and can demonstrate to the poll worker who he is; he should be able to vote. Canada handles the same issue in this manner. He also said there should be a presumption of legal capacity.

Chair Sapphire asked if Mr. Kirkman was aware of any instances in Ohio where someone showed up at the poll but was not able to say who he was and so couldn't vote. Mr. Kirkman said no, this has not occurred, but that his organization does get calls on Election Day. He said the Secretary of State has been diligent in making sure that people have access.

Chair Sapphire asked whether, if the provision is repealed, there would be no damage, since it is never used. Mr. Kirkman agreed, saying this is his view, and that it would not affect statutory law.

Ms. Bell, who has served as a poll observer, said she is distressed by that conclusion after seeing a person brought to the polls who was under restraints, drooling, unable to talk, and that this person's mother was there and essentially voted for that person. Mr. Kirkman answered that if someone thinks there is voter fraud that is another matter, but that we do not really know anything about the disabled person the committee member observed. The person could have had normal intelligence but was severely disabled. Mr. Kirkman said the point is that disqualifying that person without individualized inquiry does not happen under the current provision and wouldn't happen under anything that has been proposed.

Ms. Bell observed there should be more education so people will come forward to prevent people who lack the mental capacity from voting. The fact that there are no documented cases doesn't mean people aren't voting when they shouldn't. Mr. Kirkman said these cases do happen, but people worried about voter fraud may be overstating the problem.

Committee member Gilbert noted that he believes it is "a slippery slope" to challenge a person based on appearance or behavior. Having served as a poll worker, he once saw a man who talked to himself all the time arrive to vote and state he wanted an "Obama ballot." He said it is of great concern that poll workers do not have the medical background to challenge people. If every questionable case has to be adjudicated, probate courts would be overwhelmed. He said it would be interesting to learn what other states, which have such a provision, are doing. African-

Americans in the South have been disenfranchised because someone said they looked crazy. Not aware of any language that would be effective in clarifying when disenfranchisement would be appropriate, he is in favor of repeal without replacement of the provision.

Mr. Kirkman stated that, since 2005 when there was an ADA symposium on voting and dementia, researchers have started the process of trying to determine and define “the capacity to vote.” Even these academics who are experts in their field say they don’t have enough information to figure out who has capacity to vote, and can’t accurately test that. The standard adopted by the American Bar Association, as well as other researchers, says that if someone shows up, this means they recognize the right to vote, and they should be allowed to vote.

Rep. Amstutz asked if this section is repealed, how would the state avoid a future court decision that would strike down statutes regarding disenfranchising mental incompetents. Mr. Kirkman answered that currently there are statutory methods that can be refined to create a more cohesive system. He doesn’t think a constitutional provision is required in order for this to be in place. When asked if he was saying that the only proper way to address voter fraud is to focus on restricting someone from voting on behalf of another person, Mr. Kirkman replied this is already in place in the statute. Rep. Amstutz emphasized his belief that those statutes will fail without the constitution.

Mr. Gilbert noted that there are plenty of people who can’t see or write to fill out a ballot and they get help at the polls. The mere fact that someone needs help to vote doesn’t mean they lack the mental capacity to do so.

Mr. Kirkman said he understands why some think this should be in the constitution, but in reality, people who lack mental capacity at that severe of a level usually don’t go to the polls and never have the opportunity. It was noted that the discussion to this point had focused on incompetent people presenting at the polls, but absentee voting changes the scenario, and there could be fraud occurring outside the polling place.

Judge Fischer wondered, as a practical matter, how judges and others will be able to draw the lines on competence. He said he views the role of the Bill of Rights in the Constitution as protecting the rights of individuals and the minority. If Article V, Section 1, is kept, as a presumption of voting eligibility, with no other provision, there could be a problem. He further indicated that he is aware of cases involving people who really do not know where they are or temporarily do not know what they are doing. To let the legislature determine what constitutes a competent voter, without limitation, would not protect and help the people who need it. The Bill of Rights should be a limitation on the State, and protect those who should be able to vote. Agreeing the current language of Article V, Section 6, needs to be changed, there is a necessity of drawing a line in order to protect people’s right to vote, he said.

Chair Sapphire asked Mr. Kirkman if he could suggest a backup proposal that would alleviate this concern, and Mr. Kirkman directed him to the written materials he provided to the committee.

Ms. Bell pointed out that current statutory law only protects the right to vote for those who are mentally ill and hospitalized. If this section isn’t replaced, those people will have no statutory or constitutional protection.

Mr. Kirkman said under the guardian system mandatory appointment of counsel does not exist, and added this should also be looked at.

In summary, Mr. Kirkman said that repealing Article V, Section 6, would create a conclusive presumption of the right to vote for mentally incompetent persons because Article V, Section 1 would govern. As there is a tendency to blame the victim, the goal of his organization is to refocus the law on those who would perpetrate voter fraud rather than to punish the disabled. He emphasized the importance of this issue to people with disabilities, and cited Canadian law on this topic as a good approach to the problem. Chair Sapphire thanked Mr. Kirkman for his presentation.

Reports and Recommendations

Executive Director Hollon described three reports and recommendations being presented to the committee for its consideration: Article I, Section 2, relating to the Right to Alter, Reform, or Abolish Government, and Repeal Special Privileges; Article I, Section 3, relating to the Right to Assemble; and Article I, Section 4, relating to Bearing Arms, Standing Armies, and Military Power. The committee had voted in a prior meeting to retain all three of these provisions; however, Commission rules require that reports and recommendations be considered in two meetings, with a formal vote by the committee being taken to approve a report and recommendation at the second meeting before passing the issue along to the Commission. The committee had no comments or questions related to these Reports and Recommendations.

Committee Discussion

Chair Sapphire stated he would like to conclude review of Article V in 2015. The committee had a presentation at the last meeting regarding Article V, Section 4. The chair would like the committee to finish review of this section in the near future.

Chair Sapphire indicated it was thought Article V, Section 6, would have been an easier question than it has turned out to be. The committee now has enough memoranda, as well as the information provided by Mr. Kirkman, to allow the committee to work through specific questions. Chair Sapphire noted he hopes the committee will go through the process of figuring out what to do at its February meeting. If the committee decides to recommend repeal then there is no need to consider alternative wording; if not, members need to come up with alternatives.

Chair Sapphire asked the members of the committee to select no more than five of the proposed revisions and to let him know their choices in preparation for further discussion of this topic at the next committee meeting.

It was suggested the committee should review the proposed revisions one at a time as the committee might be able to reach a majority consensus on a particular course of action.

Chair Sapphire said he will correspond with the committee to come up with a reasonable proposal, and asked committee members to let him know if they have ideas for ways to handle this.

Rep. Amstutz asked if the judicial process should be inserted in this, and commented that the committee should be able to come up with language that replaces other words. Should the committee consider further clarification that no person shall vote for another person unless that desire has been communicated?

Chair Sapphire concluded that this is a difficult question. It was noted that the present law is so fractured there is no way to set a hearing on competence and no procedural way to address it.

Adjournment:

With no further business, the committee adjourned at 11:45 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Kirkman remarks
- Kirkman materials

Approval:

These minutes of the December 11, 2014 meeting of the Bill of Rights and Voting Committee were approved at the February 12, 2015 meeting of the committee.

/s/ Richard B. Sapphire

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 12, 2015

Call to Order:

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 9:30am.

Members Present:

Committee Members Sapphire, Amstutz, Bell, Cole, Fischer, Peterson, and Skindell were in attendance.

Approval of Minutes:

The Committee approved the minutes of the December 11, 2014 meeting.

Topics Discussed:

Executive Director Steven Hollon presented for the second time three separate reports and recommendations on Article I. The Committee had previously reviewed the reports and recommendations at the December 11, 2014 meeting of the committee. Chair Sapphire emphasized that the Committee seeks comments on the recommendations.

Report and Recommendation on Article I, Section 2 (Right to Alter, Reform, or Abolish Government and Repeal Special Privileges)

Director Hollon presented the report and recommendation on Article I, Section 2, on which the committee recommends no changes. Article I, Section 2 contains provisions that address three different but related topics: 1) inherent political power and the right to alter government, 2) equal protection and benefits, and 3) special privileges and immunities. This provision is original to the 1851 Ohio Constitution, and some of its language derives from the 1802 Constitution. There is no corollary in the United States Constitution. Although its inclusion was heavily debated at the 1851 Constitutional Convention, it has not been amended since its implementation. The 1970s Ohio Constitutional Revision Commission also did not recommend any changes to this provision, and it has generated no significant litigation. For these reasons, the report and recommendation states the committee recommends that Article I, Section 2 be retained in its current form.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by committee member Douglas Cole and seconded by

committee member Judge Patrick Fischer. It was then approved by unanimous vote of the committee.

*Report and Recommendation on Article I, Section 3
(Right to Assemble)*

Director Hollon then presented the report and recommendation on Article I, Section 3, on which the committee recommends no changes. Article I, Section 3 contains the right to assemble and the right to petition. This provision has its origins in the 1802 Constitution. Other constitutions that contain similar protections include the United States Constitution, the British Bill of Rights of 1689, and the Magna Carta in 1215. Notably, Ohio's provision is not phrased as a limitation on government power, but as an affirmative right of the people. It has not been amended since its adoption into the Ohio Constitution, and the 1970s Ohio Constitutional Revision Commission did not recommend any changes. There were no presentations to the committee and no reported cases about this provision.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by Mr. Cole and seconded by Judge Fischer. It was then approved by unanimous vote of the committee.

*Report and Recommendation on Article I, Section 4
(Bearing Arms; Standing Armies; Military Power)*

Director Hollon next presented the report and recommendation on Article I, Section 4, on which the committee recommends no changes. Article I, Section 4 contains the right to bear arms and place limitations on standing armies. This provision is original to the 1851 Constitution, and similar language existed in the 1802 Constitution. The Supreme Court of Ohio has analyzed this provision and has stated that the right to bear arms is a fundamental, individual right. In that respect, the Ohio Constitution confers greater right to the people to bear arms than does the United States Constitution. Nearly every state constitution protects the right to bear arms. For these reasons, the Committee recommends that Article I, Section 4 be retained in its current form.

Chair Sapphire asked for comments and there were none. He then called for a motion to approve the proposal. The motion was made by Judge Fischer and seconded by committee member Karla Bell. It was then approved by unanimous vote of the committee.

The committee will report these three recommendations to the Coordinating Committee at its next meeting. They will then be presented to the full Commission at its meeting in April.

Article V, Section 6 (Idiots and Insane Persons)

Chair Sapphire introduced the committee's discussion of Article V, Section 6, by describing what was discussed in the previous meeting. He also stated that he would like to come out of today's meeting with a proposal. Michael Kirkman, Executive Director of Disability Rights Ohio, was invited to return to the committee after his testimony in the last meeting.

Chair Sapphire extended his appreciation to the Commission staff for their work on recommendations to change the language of Article V, Section 6. The Chair then gave the floor to Ms. Bell.

Ms. Bell stated that she would like to move swiftly through the aspects of the possible changes about which there is little controversy. She then listed the reasons to remove the current language from Article V, Section 6, and stated that no reasons to keep the language have been raised. Chair Sapphire then called for a motion to remove the present language. Committee member Rep. Ron Amstutz asked whether a motion to remove the present language would preclude a motion to replace the language. Ms. Bell said no, that removing the language would clear the way for discussion about replacing the language. Mr. Cole suggested that removal and replacement of the language should be discussed together instead of separately. Ms. Bell granted that request and called Mr. Kirkman to the podium.

Mr. Kirkman discussed the alternative language suggestions offered by the Commission staff. These alternatives use the phrase "mentally incompetent to vote" in reference to individuals that are covered under this provision of the constitution. Mr. Kirkman suggested that the words "competent" and "incompetent" are falling out of favor. Instead, he asked the Committee to consider using the phrase "lack of capacity." He specified that there are two types of capacity: legal capacity and functional capacity.

Chair Sapphire asked whether someone who is adjudicated incompetent is automatically disqualified from voting. Mr. Kirkman replied no, that under current law, there must be a very specific finding as to competency to vote. Mr. Kirkman continued to say that "incompetent" is a purely legal term. It is used in guardianship and criminal codes. Not only has it fallen out of favor, but it has a different legal meaning than the committee is trying to capture in Article V, Section 6. Capacity, he said, is an expression of what an individual can do as opposed to what an individual cannot do. Mr. Cole asked whether capacity is more specific and incompetent is more general. Mr. Kirkman replied yes, capacity is a more specific term. Ms. Bell then directed the committee to the definitions of capacity and incompetent in the prepared materials.

Mr. Kirkman stated his belief that incompetent will be removed from the Ohio Revised Code over the next five years. For example, statutes covering Ohio protective services have switched to a capacity model as opposed to an incompetence model. Mr. Cole asked how the language would read if the provision were to use the word "capacity" and suggested that it might say "lacking mental capacity to vote." Mr. Kirkman replied yes, that is an appropriate use of that language. Mr. Kirkman also stated using the more accurate term will add to conversations about protecting individual's rights.

Chair Sapphire asked about the role of guardians in instances of incapacity to vote. If an individual is adjudicated incompetent in general, and a guardian is appointed, the guardian has the ability to make decisions for that person. That being said, Chair Sapphire asked whether the guardian of an individual who is adjudicated incompetent to vote has the ability to vote for the

person. Mr. Kirkman replied that guardians are probably not able to vote in the place of someone who lacks the capacity to vote. There are limits on what guardians are able to do. For instance, guardians do not have the right to agree to marriage. There are some decisions that, if the individual cannot make them him/herself, those decisions cannot be made.

Ms. Bell asked how questions about guardians would arise. She stated that courts have regular meetings with guardians where these questions could be decided. The process would entail talking with the individual to see whether he or she understands what it means to vote. If so, the court would not take action. However, this process has not been utilized because this question has never been raised at court. Mr. Kirkman said that issues of guardianship can come up if someone it is challenged at a polling place.

Chair Sapphire stated that the infrequency of a capacity issue being raised should be considered as the committee decides what to do with the language of Article V, Section 6. If the committee repeals the language and does not replace it, Chair Sapphire said, voting rights in Ohio would be established by Article V, Section 1. Chair Sapphire then asked whether repealing and not replacing the language of Article V, Section 6 would make the current statutes and practice of disqualifying individuals based on mental capacity unconstitutional. Mr. Kirkman agreed that repealing this provision would create a strong presumption that every Ohioan, regardless of capacity, is qualified to vote. However, he also stated that either course of action – repealing the provision or replacing it with capacity language – has unknown elements. Both could be subject to challenge.

Ms. Bell commented that repealing Article V, Section 6 might limit the General Assembly's ability to decide that those who are incompetent are not eligible to vote. Mr. Kirkman replied that there is precedent in other countries for establishing a basic notion that every citizen has the right to vote. There are models on which to base such a provision.

Chair Sapphire then commented on the length of time the committee has spent discussing this provision of the constitution, given that this particular situation almost never arises. It is very unlikely that, if the committee were to repeal this provision, the issue would arise any more than it does now. Chair Sapphire continued by saying that, if the General Assembly wants to enter into this policy area, it should do that; eventually, case law will accumulate and that will create the standard in Ohio.

Mr. Cole expressed his concern that repealing the language without replacing it would be unacceptable to the voters. It would appear as though the Commission's reason for repealing Article V, Section 6 is because we want insane people to vote. However, if we update the language, the voters might better understand the Commission's intent.

Ms. Bell stated, however, that it might be politically unacceptable to have replacement language. She believes that the committee should consider the risk of voter fraud for whichever decision the committee adopts. Ms. Bell also discussed which parties would be able to make a challenge. She then stated the fundamental question to be answered as the committee decides the future of Article V, Section 6: are we creating a more valid and fair electoral process?

Mr. Cole stated his belief that the committee is "borrowing trouble" by being concerned over which parties are able to make a challenge. Voter challenges already exist on other grounds, so

this is not a new problem that poses unique challenges. Additionally, no evidence suggests that challenges have arisen from the provision before. Mr. Cole stated that he is more interested in how the committee can replace the current language of Article V, Section 6 with terms that are not offensive but maintain the same concept. Chair Sapphire then directed the committee to the two language proposals listed in the staff memo. Ms. Bell also directed the committee to language suggestions in her memo.

Mr. Cole noted a key change to the language in the staff proposals. The current version of Article V, Section 6 is self-executing. The General Assembly is not required to act. Under the proposed language, the General Assembly is required to act. Additionally, both versions of the proposed language used the word “incompetent” instead of “lacking capacity.” Mr. Cole expressed a preference for the self-executing type of provision, but suggested the language use capacity instead of competence. He also noted the phrase “as determined by judicial process” is inherent in the constitution, but there is no harm in adding that language to the provision. However, since the constitution is a foundational document, there exists an incentive to use less language and have the details be filled-in with case law.

Chair Sapphire noted that the staff proposals contain language that limits the legal inability to vote only as long as the period of incapacity. Voting rights are restored when capacity is restored. Mr. Kirkman believes this is appropriate. The foundation should be that voters are presumed to have the capacity to vote, but that a process exists in order to determine whether voters do not have such a capacity. Mr. Kirkman also stated that strong social and legal policy exists around self-determination and presumption of capacity. This is a trend in federal law and regulations. Mr. Cole then noted that this presumption is already inherent in Article V, Section 1 of the Ohio Constitution. He is unsure whether additional language in Article V, Section 6 is needed to establish this presumption.

Director Hollon discussed the structure of the two alternative language proposals in the staff memo. He stated the staff intended to follow the sentence structure of Article V, Section 4, which addresses felons’ right to vote, when writing these proposals. The goal was to retain consistency in the constitution. Mr. Cole stated the difference between Section 4 and Section 6 of Article V is that felons have the capacity to vote. Individuals who do not have the mental capacity to vote cannot legitimately be given the choice to vote. Mr. Cole also believes it unnecessary to define capacity to vote in the section, particularly because it is rarely an issue practically.

Chair Sapphire said that he understood the rationale behind leaving the definition of capacity to the discretion of the General Assembly, but noted that there is a symbolic element of a provision of the constitution that disenfranchises a group of individuals. If the matter was framed entirely as a power of the General Assembly, the provision would have the same effect, because the General Assembly will not specifically extend voting rights to individuals who do not have the capacity to vote. Mr. Kirkman countered by saying that the current statutes in the Ohio Revised Code addressing this issue are “a mess.” If the constitution confers on the General Assembly the ability to change those laws, it would give the General Assembly the opportunity to look back at those sections of the code and repeal what is currently there. Ms. Bell asked whether Mr. Kirkman preferred a specific exclusion listed in the constitution. Mr. Kirkman responded that he preferred the General Assembly to have discretion.

Rep. Amstutz suggested that Article V, Section 6 should state that “the General Assembly shall pass laws” excluding those who do not have the capacity to vote from voting. He then asked about a recently-introduced bill that would upgrade the law around adult protective services. In that bill, no change was proposed as it relates to the “competency” language throughout those laws. Rep. Amstutz asked whether that bill should include capacity language, since capacity seems to have a different meaning in other sections of the code. Mr. Kirkman responded that incapacity language has been specific to adult protective services. Incompetence, on the other hand, is used in the context of guardianship services. He then noted that over the last 20 years, guardianship has been blending with adult protective services, and the field is moving in this direction.

Ms. Bell offered her support of this approach, in which Article V, Section 6 would give the General Assembly the power to enact incapacity voting laws, or command that the General Assembly do so. Committee member Sen. Skindell then stated that the current provision denies the right to vote to a certain group of individuals outright. The General Assembly can always pass a law defining these words in the constitution. If the General Assembly does not act, then it is up to the courts to define the terms. Mr. Cole then recommended keeping the structure of the constitutional provision the same and simply modernizing the language. If the structure remains the same, Mr. Cole believes two options exist for how the General Assembly interacts with that structure. Either the constitution will say that “The General Assembly shall pass” laws, or it will say that “The General Assembly may pass” laws. In the second option, the constitutional provision does not become effective if the General Assembly does not act. Mr. Cole asserted that the committee does not want that outcome. The first option, he stated, compels the General Assembly to act one way or another, which he said is preferable. Sen. Skindell agreed that it is best to let the General Assembly or the courts define the parameters of the language.

Mr. Cole proposed that the provision should read: “No person who has been judicially determined to lack the capacity to vote shall have the privileges of an elector.” He suggested that the provision should not include any statement about the General Assembly. Rep. Amstutz said the word “judicially” should be removed from Mr. Cole’s proposed revision. He believes that the constitution should not have language that mandates a judicial determination. Mr. Cole agreed with Rep. Amstutz’s concern. He said that the judicial determination process is still implicit in the language.

Sen. Skindell noted that one problem historically experienced is that individual board of elections officers and judges will hold the determination power for themselves. He believes this will continue to occur if the word “judicially” is not in the provision. This allows individuals to make determinations about capacity to vote. This will be the case unless the General Assembly specifies the process.

Judge Fischer commented that judicial determination will be the process used regardless of whether it is embedded in the constitution. He also noted that, currently, these determinations are not appealable decisions. A writ of mandamus is the only way to appeal. Judge Fischer suggested the committee should decide what the process should look like for the next 50 years. Chair Sapphire responded that this is a reason to repeal Article V, Section 6, and not replace it. Judge Fischer disagreed, and stated that the language should be replaced. He believes that repeal would be defeated by the voters.

Mr. Cole made a motion to amend Article V, Section 6 to say the following: “No person who lacks the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity.” Committee member Sen. Bob Peterson seconded the motion.

Sen. Skindell commented that the court will generally defer to the current process for determining incapacity; unless it is determined to be a violation of voting rights laws or is inconsistent with the constitution. If the General Assembly does not act and the secretary of state issues an order, the courts generally will defer to the secretary of state. Judge Fischer responded that this will depend on the level of scrutiny applied. Mr. Cole noted that it is difficult to predict how the courts will act, but that, generally, constitutional words are subject to interpretation by courts, and the courts look to other sources for guidance when interpreting. Mr. Cole said the court will likely take upon itself the power to interpret what this provision means, but that it also will look to the General Assembly and secretary of state for guidance. He emphasized that any consultation with the secretary of state would be for guidance, not deference.

Chair Sapphire proposed that the committee table the motion. He suggested the proposal be considered during the first part of the next committee meeting in April. He asked Commission staff to provide the committee with a critical analysis of the language that Mr. Cole proposed.

A vote was taken on the motion to table the proposition and the committee was unanimously in favor. Chair Sapphire thanked Mr. Kirkman for his assistance.

Adjournment:

With no further business, the committee adjourned at 11:45 a.m.

Attachments:

- Notice
- Agenda
- Roll call sheet
- Kirkman materials

Approval:

These minutes of the February 12, 2015 meeting of the Bill of Rights and Voting Committee were approved at the April 9, 2015 meeting of the committee.

/s/ Richard B. Sapphire

/s/ Jeff Jacobson

Richard B. Sapphire, Chair

Jeff Jacobson, Vice Chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, APRIL 9, 2015

Call to Order:

Chair Sapphire called the meeting of the Bill of Rights and Voting Committee to order at 11:17 a.m.

Members Present:

A quorum was present with committee members Sapphire, Jacobson, Amstutz, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The committee approved the minutes of the February 12, 2015 meeting.

Reports and Recommendations

Chair Sapphire reviewed the process of approving reports and recommendations.

Executive Director Steven C. Hollon presented for the first time two separate reports and recommendations on Article I.

Article I, Section 13 (Quartering of Troops)

Executive Director Hollon first presented the report and recommendation on Article I, Section 13, concerning the quartering of troops. This provision is original to the 1851 Ohio Constitution and is almost identical to its predecessor – Article VIII, Section 22 of the 1802 constitution. In addition, this provision is similar to the Third Amendment to the U.S. Constitution. When Ohio adopted this prohibition in 1802, the quartering of troops in private homes had become a symbol of British oppression. The 1851 provision has not been amended since its implementation. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this provision, and it has not generated any significant litigation. The report and recommendation states that the committee recommends that Article I, Section 13 be retained in its current form.

Chair Sapphire asked for member comments. Chair Sapphire called attention to footnote 14 of the report and recommendation. The citation contains a volume and section number which are the same. This is not common, so Chair Sapphire asked for staff verification that this was not a typographical error. It was later confirmed that the citation is correct.

Article I, Section 17 (No Hereditary Privileges)

Executive Director Hollon presented the report and recommendation on Article I, Section 17, concerning the granting or conferring of hereditary privileges. This provision is original to the 1851 Ohio Constitution and is almost identical to its predecessor, Article VIII, Section 24 of the 1802 constitution. In addition, this provision is similar to Article I, Sections 9 and 10 of the U.S. Constitution. The drafters of the 1802 constitution adopted this prohibition as a rejection of Old World notions of birthright and fixed social status. The drafters also employed this provision to ensure that Ohioans would not be influenced in times of war by foreign nations who might offer them titles of nobility. The 1851 provision has not been amended since its adoption. The 1970s Ohio Constitutional Revision Commission did not recommend any changes to this provision, and it has not generated any significant litigation. The report and recommendation states that the committee recommends that Article I, Section 17 be retained in its current form.

Chair Sapphire asked for member comments and none were provided. He then called for public comment on both reports and recommendations and none were provided.

Reports and Recommendations Previously Approved:

Article I, Section 4 (Bearing Arms; Standing Armies; Military Power)

Chair Sapphire explained that, at the March Coordinating Committee meeting, committee member Senator Obhof expressed concern regarding a statement previously contained in the report and recommendation for Article I, Section 4. The sentence discussed the impact of the U.S. Supreme Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008), on the right to bear arms. Chair Sapphire stated that the sentence of concern has been removed from the report and recommendation. The change has no substantive effect on the report and recommendation.

Executive Director Hollon informed the committee members that, since the change has no substantive effect on the report and recommendation, the full Commission will still be voting on the report and recommendation this afternoon unless the committee objects.

Representative Amstutz and Senator Skindell both asked whether procedure required committee members to take a vote on this change. Executive Director Hollon stated that whether to take a vote is up to the committee. He assured the committee that the Coordinating Committee does not anticipate recommending these types of changes in the future but that this was an isolated situation.

Senator Skindell made a motion to accept the change. Representative Amstutz seconded the motion. A unanimous voice vote was taken to accept the change.

Committee Discussion:

Article V, Section 6 (Idiots and Insane Persons)

Chair Sapphire directed the committee's attention to the work previously conducted by the committee on Article V, Section 6. He reminded members of testimony given by Michael Kirkman, Executive Director of Disability Rights Ohio, and memoranda written by committee member Karla Bell. Chair Sapphire stated that there appears to be a consensus that the current language has to change, but the committee still needs to decide whether the provision will be repealed all together or if language will be replaced. He then called the members' attention to a memorandum prepared by staff outlining the current status of the discussion. He expressed appreciation for this memorandum.

Executive Director Hollon gave a brief presentation outlining the contents of a memorandum written by Shari L. O'Neill, Counsel to the Commission, which provides a summary of the status of the committee's work on Article V, Section 6. The memorandum, included in the meeting materials, outlined the three replacement proposals suggested at the February 2015 meeting. First, the memorandum identified a proposal drafted by Commission staff that was based on the expressed goals of the committee up to that point: "The General Assembly shall have the power to exclude an otherwise qualified elector from voting while lacking the mental capacity to vote, as determined by judicial process." Second, the memorandum identified the proposal suggested by committee member Douglas Cole: "No person who lacks the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity." Finally, the memorandum identified a proposal suggested by committee member Karla Bell: "No person who lacks the mental capacity to understand the act of voting shall be entitled to the privileges of an elector during the time of such incapacity." The memorandum then addressed the differences in the three proposals, also addressing which expressed goals of the committee were satisfied by each.

Executive Director Hollon then outlined the legal issues of each proposal as outlined in the memorandum. The memorandum focused on due process and equal protection analyses as deemed important by a frequently-cited case in the area of voting rights for the mentally impaired, *Doe v. Rowe*, 156 F. Supp.2d 35 (D.Maine, 2011). The Maine federal district court in *Doe* held that voting is a fundamental right, that individuals have an interest in maintaining that right, and that, as a result, a due process and equal protection analysis is necessary when assessing voting rights questions. Executive Director Hollon also outlined the burden-of-proof analysis contained in the memorandum, its review of other state constitutional provisions on this topic, and its summary of the arguments for and against the inclusion of various elements in the final proposal. These elements include whether to expressly require the General Assembly to enact laws relating to disenfranchisement, whether the proposal should authorize a judicial determination, whether the proposal should contain a reference to "the privileges of an elector," and whether the proposal should outline what it means to be mentally incapacitated for voting purposes.

Chair Sapphire suggested that the first issue to consider is whether the section should be repealed entirely. If that is the case, there is no need for further discussion. However, Mr. Sapphire

acknowledged that he is likely the only member with this view and that a repeal likely would not pass in the long-term. Vice-Chair Jacobson expressed that he is not comfortable with a repeal. He would rather see the section replaced.

Chair Sapphire suggested, in light of this fact, that the committee discuss the section's replacement. He recalled that the committee seems to have a consensus on three main issues. First, that the incapacity must be with respect to voting. Second, that regardless of the disqualification that arises, the disqualification should only last as long as the incapacity remains. Finally, the phrase "incapacity" should be used to describe the mentally impaired. Chair Sapphire stated the next issue to be decided is whether there are other issues where a consensus is needed. He asked for member comments and ideas.

Committee member Cole pointed out that one way that his proposal and the Bell proposal differ from the staff proposal is that the staff proposal is not self-executing. He explained that the staff proposal requires action by the General Assembly. What happens if the General Assembly chooses not to act? Mr. Cole stated he favors a self-executing proposal and asked what other members thought. He suggested that a vote be taken on the issue of self-execution. If the members felt that self-execution is needed, that could narrow the discussion. Vice-Chair Jacobson stated that a self-executing provision would not preclude the General Assembly from acting.

Representative Amstutz offered a sample replacement which built off of the Cole proposal and contained two sentences instead of one. He stated that the goal of this alternative is to address the three potential shortcomings of the Cole proposal, while also addressing the staff proposal's lack of a self-executing nature. He offered, "No person who lacks the mental capacity to vote shall be entitled to vote during the time of such incapacity. The General Assembly shall have the power to enact laws executing this provision, provided that such laws include appropriate judicial process." He added that this is just a suggestion for debate, not a new proposal.

Vice-Chair Jacobson noted that the phrase "privileges of an elector" is not the same as voting, because "privileges" actually means something broader than just casting a vote. It encompasses all of the roles that a person can play, such as running for public office or signing petitions. He said that because of this he wants the replacement section to retain the "privileges" language instead of changing it to "voting." He added that as long as the replacement states, "General Assembly has the right to make laws," there is no need to require appropriate judicial process in the language. The General Assembly can pass any statutes that it likes; there is no requirement that the laws be constitutional. If those laws are not constitutional, the courts can strike them down. With regard to the "privileges" question, Chair Sapphire drew attention to Article V, Section 4, relating to felon disenfranchisement, which describes voting as a privilege and is not self-executing. Section 4 expressly gives the General Assembly power to decide who has the power to vote. He added, however, that there is no reason why any replacement provisions need to match other provisions. Representative Amstutz concurred with Vice-Chair Jacobson's suggestions.

Chair Sapphire agreed with Mr. Jacobson's statement that the replacement section does not need to be, but should be, written in a way that diminishes constitutional vulnerabilities. In addition, he pointed out that a section can authorize the General Assembly to do whatever and act in a way it deems constitutional. He stated that he believes the replacement needs to be a provision that,

regardless of its self-executing nature, has a procedural safeguard in order to be effectuated. He stated a preference for the staff proposal because it requires adjudication.

Mr. Cole disagreed with the notion that a state constitutional provision is unconstitutional unless it specifies adjudicatory procedures in excruciating detail. He does not see much case law to support that. Instead, he sees the question as whether the individual receives process and whether that process complies with due process. This would require a case-by-case analysis. Mr. Cole stated that the standard for a facial challenge under the Due Process Clause is whether it would be unconstitutional in all of its applications. In his opinion, a provision lacking reference to judicial determination is not unconstitutional in all settings because there could be a statute which covers this.

Chair Sapphire stated that whether the committee includes a provision on the basis of its constitutional necessity is a matter of policy. Regardless of what is done by the committee, it is true that the General Assembly's actions are ultimately subject to constitutional challenge. However, if the committee sees an adjudicatory process as a prerequisite, why not state it in the constitutional provision?

Senator Skindell expressed that he is not in support of language requiring General Assembly involvement. One issue in his mind, however, is the practical effect of this provision; it could allow the denial of an individual's rights without adjudication or anything else. He recalled situations that he has been told about where board of elections officials have made a self-determination that a person lacks mental capacity. The official used this section to prevent someone from voting. Because of this potential problem, he said his inclination is to go along with the idea worked into other states' provisions by requiring a judicial determination before denying the right to vote. If the Cole or Bell proposals are re-written to include this element, he said he would tend to favor them a little bit more.

Chair Sapphire agreed that he shared this tendency and would be more in favor of the Cole proposal if it included a judicial determination provision. He asked if there is a fundamental problem with adding language requiring judicial process, or is the argument that the language is just not necessary. Mr. Cole responded that his problem lies with the facial challenge motivation for including the language. He stated he has no problem with the language itself and would not be opposed to include the language if the inclusion is based on another reason. He concluded that he had never heard of Senator Skindell's concern of people being denied access in the polling place here in Ohio. Senator Skindell stated his stories are not about polling place denials but about board of elections officials going into nursing homes to assist with the voting process, indicating that the officials use these provisions to make their own independent determination that a person does not have the right to vote. Vice-Chair Jacobson stated that he was on a board of elections, and his experience was that officials have contested someone's vote along partisan lines. He said general disenfranchisement is not occurring. Instead, these officials are trying to not record a vote that they do not want counted. Vice-Chair Jacobson then stated that he is not sure about the solution to this debate; he is just uncomfortable with the thought that the provision must be detailed about what the General Assembly is allowed to do. He stated no objection to making the replacement more constitutional, so if this is the argument for requiring a judicial

determination, it should be included. However, he has not heard of anyone challenging this issue in court.

Chair Saphire stated that there is something surreal about this conversation, noting that, according to Michael Kirkman's testimony at the last meeting, this issue almost never arises. Therefore, he said, this remedy is prophylactic in nature only. However, he said, if something like this did happen, the individual would be forced into court on a very short timeline. Chair Saphire said that a voting challenge puts the burden on the individual being denied the right, rather than the challenger, and there is no requirement of adjudication to take the right away. He said that if the right to vote is so precious, the presumption should be that the individual is qualified. The state should then have the burden of establishing the disqualification. The right should be protected, and the state should have to go to court to take it away.

Judge Fischer suggested an alternative, directing the committee's attention to the constitutional provision in South Carolina. This alternative would read, "The General Assembly shall establish disqualifications for voting by reason of mental incompetence and may provide for the removal of such disqualification." Mr. Cole pointed out that the South Carolina provision is not self-executing. It allows for the General Assembly's action, but the General Assembly can still choose not to act. Judge Fischer stated that he offered the suggestion merely as a way to keep the committee moving forward. He stated that the committee is approaching this conversation in a short-sighted manner. The analysis of competency will change before the next modernization commission meets to consider revisions to the constitution. As a result, there should be some leeway. He said that giving or mandating General Assembly authority would be a good thing.

Vice-Chair Jacobson suggested another replacement proposal. Based on the consensus of the committee that "idiots and insane persons" language should be struck, this replacement would add in "no person lacking mental capacity to vote" and leave the rest intact. By doing so, the committee would not be creating problems for existing procedures and also would not be creating new procedures. He said that this would allow the committee to "cut the Gordian knot." Chair Saphire responded that this alternative could have a danger of doing too little. Mr. Cole said that this is the same as his proposal, except his proposal adds, "during the time of such incapacity." Mr. Jacobson agreed that that Mr. Cole is correct that both proposals are the same. Representative Amstutz expressed a desire to focus less on voting and instead look to the broader capabilities. Senator Skindell stated a concern that "mental capacity" is much broader than "idiots and insane persons" and will likely deny a large number of voters not currently denied. Vice-Chair Jacobson agreed that this would be risky, but said there needs to be something there. Representative Amstutz pointed out that a qualifier already exists, "to exercise the duties of an elector."

Chair Saphire asked if Vice-Chair Jacobson would agree that a provision should be added for, "as long as the incapacity should last?" Mr. Jacobson said yes.

Mr. Saphire asked what would be wrong with Mr. Cole's original provision plus the addition of a reference to judicial adjudication. Senator Skindell expressed that he had the same question. The provision could read, "No person who has been adjudicated to lack the mental capacity to vote shall be entitled to the privileges of an elector during the time of such incapacity." Senator

Skindell stated a preference for the language of the Arizona, Georgia, and Delaware constitutions as included in the meeting materials. Chair Saphire summarized that the provision should be self-executing, should be focused on general incapacity, and should be non-specific, allowing the courts to work out the details. To accomplish this, he said all that would need to be added is a judicial adjudication provision.

Representative Amstutz suggested adding the term “adjudged” like another state had because going to court seems like a large burden. Mr. Jacobson asked who would bring the case. Chair Saphire said that this provision would not preclude the General Assembly from developing a plan. Mr. Jacobson returned to the nursing home example. He stated that this problem is not likely to arise for those individuals who can walk into a polling place. It will be a problem for those who are at the end of their life and cannot speak. Their silence will be taken advantage of by board of elections officials who want to count that individual’s vote for their party. Judge Fischer stated that under the current system the board of elections makes the determination and the individual has no direct appeal from that determination. They must file a writ of mandamus. He returned to his earlier concern regarding developments over the coming years. He said, in twenty years you may be able to appeal these determinations online. As a result, he said he sees no problem with being specific, so long as the provision is flexible. Chair Saphire said that Senator Skindell’s proposal of just adding in language referencing a judicial adjudication will still allow the General Assembly to change the process later as needed. Vice-Chair Jacobson stated that the term “adjudication” sounds more formal and restrictive. Senator Skindell said that the General Assembly could make it an administrative adjudication. The goal should be to preserve the person’s right to due process and the privileges of an elector. The privileges of an elector are broad and allow the individual to pursue a taxpayer action under certain circumstances. These determinations, therefore, will go broader than any statute or local provisions, so due process is necessary.

Chair Saphire asked if Steven Steinglass, Senior Policy Advisor for the Commission would like to comment. Mr. Steinglass stated that “privilege” is only used in five places in the constitution, while “elector” is used in many. He went on to explain that the contrast being made regarding self-execution is too sharp. The General Assembly can still be left a way to act and should be left some sort of role. He suggested that the language be, “No person who lacks the mental capacity to vote may be denied outside of [some provision allowing the General Assembly to act.]” This would also create a self-executing provision through the use of the term “may.”

Vice-Chair Jacobson stated that he would like to go back to the Cole provision. He stated that the committee has not given the General Assembly a role but has told them what to do. Some members think a judicial process should be included and some do not. One thing that everyone has agreed upon, however, is not to use the words “idiots and insane persons.” He suggested that the proposal be limited to this change and leave out these other contentious issues. Continuing to try to deal with them will leave the committee in knots. He stated that there should also be a provision for re-instatement because all seem to agree on that idea as well. He expressed that he does not see a need to go any further. The more simple the provision, the more likely it is to pass. He said Cole’s provision, therefore, provides the best option because its inclusion of “during the time of such incapacity” opens the door for some sort of judicial adjudication. In addition, by being less detailed, the courts and the General Assembly can decide what that will look like.

Then the committee can move on to the next topic. Chair Sapphire asked the staff to create one more proposal incorporating Mr. Jacobson's ideas.

Senator Skindell asked whether there is a consensus that a reference to the General Assembly be removed. All members agreed. Senator Skindell made a final suggestion that "to vote" be replaced with something more artful.

Chair Sapphire stated that this consensus will take the committee into its next meeting and the main sticking point remaining will be the inclusion of a judicial adjudication process.

Representative Amstutz stated that a court dealing with this provision would have to follow due process.

Chair Sapphire stated that this does not get rid of the issue regarding the right to vote being a presumptive right, but this new proposal will give the committee something to vote on, allowing the committee to move forward.

Mr. Cole asked if a poll should be taken on the issue of an adjudicatory process. Senator Skindell stated that he leans toward supporting a phrase about adjudication, but it can be administrative through the board of elections. He said the General Assembly could design the process without changing the Cole proposal. Senator Skindell then returned to his concern that mental capacity is broader than the current phrase. He stated a discomfort with the idea that board of elections workers are making the interpretation on their own. Mr. Cole stated that he shares these concerns but feels that these are legislative concerns rather than constitutional ones. He said that many constitutional provisions leave rulemaking to the General Assembly and the courts. He prefers to let the General Assembly make this determination.

Chair Sapphire stated that the committee is out of time. Executive Director Hollon stated that this conversation has been helpful to the staff, and they will draft a proposal for the next meeting which includes some options for phrasing.

Representative Clyde requested that a discussion be had at the next meeting regarding whether or not the language will label voting as a "right" or a "privilege" because people seem to be using different terms. Mr. Cole stated that there can be rights of an elector or a privilege. Vice-Chair Jacobson commented that this issue is currently a large, on-going political fight. He stated that he would prefer not to address this issue because it is too controversial and would get in the way of the committee finishing its task.

Adjournment:

With no further business, the committee adjourned.

Attachments:

- Notice
- Agenda

- Roll Call Sheet
- Reports and Recommendations for Article I, Section 13 (Quartering of Troops) and Section 17 (No Hereditary Privileges)
- Memorandum by Shari L. O’Neill titled “Review of Proposals Regarding Article V, Section 6 (Idiots and Insane Persons),” dated April 2, 2012
- Research materials: *Doe v. Rowe*, 156 F. Supp.2d 35 (D. Maine 2001); *IMO Absentee Ballots v. Trenton Psych. Hospital*, 331 N.J. Super. 31, 750 A.2d 790 (Sup. Ct. N.J. 2000); Ballotpedia article titled “Kansas Voting Disqualification Amendment, Constitutional Amendment Question 2 (2010)
- Memorandum by Hailey C. Akah titled “Summary of Written Material and Previous Presentations on Article V, Section 4 (Felon Disenfranchisement)”

Approval:

These minutes of the April 9, 2015 meeting of the Bill of Rights and Voting Committee were approved at the June 11, 2015 meeting of the committee.

/s/ Richard B. Sapphire

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-Chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JUNE 11, 2015

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:40 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Fischer, and Gilbert in attendance.

Approval of Minutes:

The minutes of the April 9, 2015 meeting of the committee were approved. Chair Saphire complimented the staff for the comprehensive, detailed minutes, as did committee member Karla Bell.

Reports and Recommendations

The committee heard a second reading of the reports and recommendations for Article I, Section 13 (Quartering of Troops) and Article I, Section 17 (No Hereditary Privileges).

Article I, Section 13 (Quartering of Troops)

Executive Director Steven C. Hollon outlined the background of Article I, Section 13, describing its history as a provision that prohibited the military from using private homes and businesses to house and provide for standing armies. Mr. Hollon said that the committee had concluded that there should be no change to Section 13, and so recommended that the section be retained in its present form. At the conclusion of the reading, Chair Saphire invited public comment. There being none, Vice-chair Jeff Jacobson moved to adopt the report and recommendation, which was seconded by Judge Patrick Fischer. The committee then voted unanimously to approve the report

and recommendation for Article I, Section 13, which Mr. Hollon said would be forwarded to the Coordinating Committee for its approval.

Article I, Section 17 (No Hereditary Privileges)

Mr. Hollon then held a second reading of Article I, Section 17, which prohibits the awarding of hereditary privileges. He explained that, in the early days of the United States, founders were concerned about foreign influence and wanted to avoid the hierarchical systems of privilege and title that had been prevalent in Europe. Mr. Hollon indicated that the United States Constitution, as well as many state constitutions, includes similar prohibitions on hereditary emoluments. After explaining this background, Mr. Hollon indicated that the committee had concluded this section should be retained in its present form, and that this conclusion is reflected in this report and recommendation. At the conclusion of the reading, Chair Sapphire invited public comment. There being none, Mr. Jacobson moved to adopt the report and recommendation, which was seconded by Judge Fischer. The committee then voted unanimously to approve the report and recommendation for Article I, Section 17, which Mr. Hollon said would be forwarded to the Coordinating Committee for its approval.

Committee Discussion:

Article V, Section 6 (Idiots and Insane Persons)

Chair Sapphire then directed the committee's attention to the next item on the agenda, which was further discussion of possible recommended changes to Article V, Section 6, disenfranchisement of "idiots and insane persons."

Referencing a memorandum by Mr. Hollon, Chair Sapphire indicated that this was the fifth or sixth meeting in which the committee has devoted significant attention to this issue, and that the committee had held various discussions about how to change the provision. He added the committee has had the benefit of at least three comprehensive memos by staff on this issue, in which were offered proposals and counter-proposals for change.

Mr. Hollon then reviewed his memorandum with the committee, indicating that the memo was staff's attempt to distill the conversation that occurred during the committee's last meeting, by diagramming options for phrases to replace the current "idiots and insane persons" language. Mr. Hollon said these choices boiled down to whether the committee wants an adjudication requirement, how a lack of mental ability should be described, whether to indicate such a person "lacks the capacity to vote" or, alternately, "lacks the capacity to understand the act of voting," and whether a proposed provision would limit such a person from voting, or from being entitled to the privileges of an elector, during the time of their incapacity. Chair Sapphire added that the committee also might consider whether the act of voting ought to be described as a privilege or a right, a question that Mr. Hollon indicated also had been mentioned in the memorandum.

Chair Sapphire directed the committee to the first question, which was about adjudication, giving a brief summary of members' comments about that issue at the previous meeting. He identified committee member Doug Cole as opining that an express mention of adjudication is not required. Chair Sapphire said committee member Sen. Mike Skindell had expressed his opinion

that adjudication should be required before denying the right to vote, which Chair Sapphire said was his position as well. He said Mr. Jacobson was against including an express requirement of adjudication, with committee member Judge Fischer advocating for the approach taken by South Carolina, which doesn't specify adjudication. Chair Sapphire said he was not sure of the view of committee member Representative Ron Amstutz, who then commented that his position was that he had been trying to bridge the gap between differing opinions on the question of adjudication. Chair Sapphire said that the committee needs to determine whether adjudication is required. Ms. Bell then asked if the committee could take a straw vote to see if there is support for requiring an express reference to adjudication.

Ms. Bell said she wants to be sure there is a procedure in place that includes constitutional safeguards, and that this would include adjudication in some form.

Mr. Jacobson said he has several concerns about expressly mentioning adjudication. He said he agrees there is difficulty in the prospect of the state taking away a right, but that there is a long, complicated history with the activities of poll workers and their need to be able to make determinations about the capacity of an individual to cast a vote. He said including an adjudication requirement is impractical, and, if due process is required, then that is what courts are for. He said if the committee's recommended provision is silent on that issue, it does not affect a requirement that there be due process. He said, "just because we don't say it doesn't mean it won't be done."

Ms. Bell disagreed with this position. Mr. Jacobson continued that he doesn't think there has been a general feeling that people have been unfairly deprived.

Chair Sapphire said this issue is surreal because this issue just doesn't come up. He said he agrees with Mr. Jacobson that the constitutional issue is kicked down the road, and that courts will have to decide if that person was given due process. Chair Sapphire said he doesn't think the absence of reference makes it unconstitutional but it does make a difference because it allocates the presumption of who has the responsibility to do what. He said the burden then goes on the individual rather than the person who wants to prevent their voting. Chair Sapphire said the burden should be on the state before the person is disenfranchised, adding that, at least symbolically, if the right to vote is important then a person should not be deprived until the state meets that burden.

Mr. Jacobson said he thinks this would be unwieldy in practice. He said he doesn't discount the principle behind it, but that it is a solution in search of a problem. He said if this is a problem, which he doesn't think it is, the committee would be advocating a process that would add to the burden of the court system. He said such a provision would require asking boards of elections or poll workers to scour voting lists in advance of an election in order to come up with a list of incompetent people. Chair Sapphire said he disagrees that would be a burden.

Committee member Edward Gilbert said "voting is a right, period." He said the committee should take the offensive language out of Section 6, and that his preference would be for there to be no express restriction on the right to vote for those having a mental incapacity. But, he added, if there is to be a restriction, then the provision must say something about due process or it is not

fair to the citizen. Mr. Gilbert said if the committee doesn't repeal the entire section, then there must be a reference to adjudication.

Rep. Amstutz said common sense suggests there will be a range of situations that are not difficult where two poll workers are in a position to make a decision together without court involvement. But, he added, there will be hard cases where there will be different opinions between poll workers, or some other situation producing a conflict, in which case there needs to be a reasonable adjudication process.

Ms. Bell said the idea that poll workers are empowered to decide who looks like they should vote is terrifying to her. She said there is nothing in the Revised Code right now that allows someone to bring an action to determine whether someone is competent to vote. She said the system is a mess, and there is no coherent law. She speculated that may be why there is a lack of case law on that issue. She said she is not sure it is persuasive that there is no apparent evidence of a problem.

Judge Fischer commented that requiring a prior adjudication would create a severe problem. He said it is never clear who will show up at the polls or ask for a ballot. He said it would be necessary to scour the voting rolls and decide who is competent ahead of time. He said that the legislature has not provided a procedure to bring these actions, so someone must bring a mandamus action, but then there is no right of direct appeal. He said if the committee wants to prevent voting because of a lack of capacity, then there needs to be a procedure, but that it is the legislature's job to provide specific procedures. Judge Fischer said the idea of requiring a prior adjudication would create a problem in the courts. He said the boards of elections do clean up the rolls every other year which is when this would show up.

Mr. Gilbert asked: "doesn't that cause a real problem?" He added that, with medication, some people would be able to vote. He said this is not a set system where they could even adjudicate it because mental capacity could be a changing condition.

Judge Fischer said he agrees there is a problem with the provision, but, regardless, it should be a self-executing provision, without expressing a need for an adjudication.

Ms. Bell commented regarding the report of the Constitutional Revision Commission in the 1970s, indicating that the best course of action would be to delegate to the legislature to determine the appropriate procedure because the details are too cumbersome. Judge Fischer agreed, saying the committee should express a standard and let the General Assembly sort it out.

Representative Kathleen Clyde said she agrees with requiring adjudication, saying she has been a poll worker and hasn't seen a problem, but this is an important right that should not be removed lightly. There needs to be a procedure for reviewing the evidence and making a sound decision about whether a person can vote. She added that the voter makes the decision about his or her vote, not the poll workers. She said she likes the idea of including an adjudication clause.

Mr. Jacobson said he would draw a distinction between adjudication and due process, noting that sometimes an administrative action can be enough. He said there are non-judicial procedures

that can be followed if there is a problem. He said requiring adjudication could also be a problem for absentee ballots where there isn't face-to-face contact. The requirement would be "a disaster" if it meant the state had to bring an action against a whole class of people.

Chair Saphire said he doesn't think Mr. Jacobson's described scenario is accurate. Mr. Jacobson said a provisional ballot would handle it, and that nobody needs to adjudicate it on election day.

Chair Saphire then polled the committee on whether it would vote to include an adjudication requirement in the proposed provision. He said, for purposes of the minutes, a straw vote on the question of adjudication was four to three to include an adjudication requirement prior to disenfranchisement. However, it was noted that some members of the committee were absent and so unable to register their positions on the question.

Chair Saphire then directed the committee to the issue of whether a proposed provision should refer to individuals as "lacking mental capacity" or "being mentally incompetent."

Ms. Bell said there is a statutory definition of "competent" and "mentally incompetent," as being, in part, any person who is so mentally impaired that he is incapable of taking proper care of self or property. Chair Saphire said his sense from Michael Kirkman, executive director of Disability Rights Ohio, is that the reference should be to a lack of mental capacity. Mr. Jacobson said there may be consensus on that question but he is reluctant to agree until he sees the proposed provision in its entirety.

Chair Saphire then directed the committee to the question of whether the proposed provision should refer simply to voting or to "understand the act of voting." He said if the purpose is to disenfranchise as a result of a lack of mental capacity, then the incapacity has to be tailored to voting. Mr. Jacobson said he is worried that using the phrase "understand the act of voting" signals that the committee would be creating an intentional difference. He said, if that is the recommendation, judges might "read more than we intend into it or more than they need to. If we just say 'vote', it allows jurisprudence to develop better. There are implications we don't necessarily mean to get at."

Mr. Gilbert said he would agree with that opinion, and Chair Saphire and Ms. Bell also said they agreed. Chair Saphire added that a court will ultimately determine whether the person has the capacity. Judge Fischer said he would go with using the plain reference to "voting," saying it would result in less litigation. Chair Saphire summarized the consensus of committee members as being that the phrase ought to be "mental incapacity to vote."

Chair Saphire then directed the committee to the question of whether the phrase should read "act of voting" or "privileges of an elector." Mr. Jacobson noted there are two issues in this because "voting" and "privileges of an elector" are not the same thing. He continued, saying there is also a discussion to be had about the concept of "right" versus "privilege." He said it is a mistake to limit this provision to a right to cast a vote because it invites other questions, and because the concept of "privileges of an elector" is a wider concept than just voting.

Chair Sapphire noted that Article V, Section 4 says “exclude from the privilege of voting.” Mr. Jacobson said the committee should harmonize both concepts, and that the language used ought to extend to all opportunities a voter has to participate in the democratic process.

Ms. Bell suggested an alternative that might satisfy both sides, such as using the phrase “right to vote and privileges of an elector.” Mr. Jacobson said he would want reinforcement from a legal authority on that, but that using that phrase would relieve the concern about whether the committee is signaling whether something is a right or a privilege. Rep. Amstutz said he might be able to go along with that, and suggested another approach might be to use the word “functions” instead of “right” or “privilege.”

Mr. Gilbert asked whether anyone thinks voting is a privilege and not a right, emphasizing his view that voting is a right. Mr. Jacobson said there is a history of a dispute regarding rights and privileges, with some people trying to classify things as rights when they are not. He said “we don’t want to wade into that controversy.”

Rep. Clyde said the option of stating both “right to vote” and “privileges of an elector” does not respond to the concerns she has. She also has issues about vagueness if the phrase reads “or.” She said there is no gray area about voting being a right. Ms. Bell said her proposal was that the phrase use the word “and” rather than “either/or.” Rep. Clyde said that is still a gray area, and she remains uncomfortable with using both phrases in the provision. Mr. Jacobson said Rep. Clyde’s position means the committee would be unable to reach a consensus on that issue.

Chair Sapphire suggested the committee take a straw vote about whether to include language that describes it as “right to vote and privileges of an elector.” Mr. Gilbert said “it is a right, period.” Mr. Jacobson said adding “privileges of an elector” doesn’t change that.

Chair Sapphire asked whether the concern is alleviated by going back to Article V, Section 1, which uses the word “entitled.” He said “entitled” is the language of “right” not “privilege.” Mr. Jacobson said the word “privilege of an elector” has not been interpreted that way, and that focusing on the word “entitled” could make a problem where none exists. He suggested the word “prerogative” could be substituted for “entitlement.”

Judge Fischer said Section 1 makes a distinction about the right to vote which is inherent. He said it describes it as the “qualifications of an elector” and that the person is entitled to vote at all elections. He said saying a right to vote doesn’t encompass privileges of elector; it is the other way around, meaning that “privileges of an elector” encompasses other activities. Chair Sapphire pointed out that there was a difference in the 1960s between a privilege and a right. Mr. Jacobson said the committee should mention both. Judge Fischer said there is a difference and that the committee should understand the difference.

Ms. Bell asked whether her suggestion of saying “right to vote, and privileges of an elector” could satisfy committee members’ concerns. Mr. Gilbert said he likes that option. Ms. Bell then shared relevant portions of the record of the activities of the 1970s Constitutional Revision Commission with the committee so that it could compare that commission’s recommended

language. She asked that staff send a copy of portions of those proceedings to the committee for its consideration prior to the next meeting.

The committee then turned to new business. Judge Fischer suggested that an idea he had proposed about a constitutional provision that would create a right to internet privacy might be given more immediate attention. He said he envisions an amendment that would balance the need for public safety and the right to privacy. Chair Sapphire agreed that the privacy suggestion deals with an important subject, and originally was contemplated as being on the committee's agenda at some point in the future because it was perceived as being potentially complicated and controversial. Chair Sapphire said the committee would be discussing the agenda for future meetings at its next meeting and could determine when to address Judge Fischer's suggestion at that time. Ms. Bell complimented staff and noted that the committee is now making good progress because of the leadership provided by Mr. Hollon.

Adjournment:

With no further business, the committee adjourned.

Approval:

These minutes of the June 11, 2015 meeting of the Bill of Rights and Voting Committee were approved at the September 10, 2015 meeting of the committee.

Excused

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, SEPTEMBER 10, 2015

Call to Order:

Vice-chair Jeff Jacobson called the meeting of the Bill of Rights and Voting Committee to order at 9:37 a.m.

Members Present:

A quorum was present with Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the June 11, 2015 meeting of the committee were approved.

Committee member Karla Bell asked for a correction to her remarks as recorded on page four of the minutes, saying that one sentence did not indicate what she had actually said. She agreed that the sentence could be removed from the minutes. The committee then approved the minutes as corrected.

Reports and Recommendations

Article V, Section 6 (Idiots and Insane Persons)

Steven C. Hollon
Executive Director

Executive Director Steven C. Hollon presented a draft report and recommendation regarding Article V, Section 6, relating to the disenfranchisement of mentally incapacitated persons.

Mr. Hollon said staff was presenting it for the committee's consideration. He said that the committee may want to change the title to avoid use of the phrase "idiots and insane persons,"

perhaps instead using the phrase “mental capacity to vote” or something of that nature. He said the staff thinks it has captured the sense of the committee, having narrowed down the different issues and factors related to this topic.

Vice-chair Jacobson then asked for discussion on the report and recommendation.

Vice-chair Jacobson said he sees there being two questions: first, does there need to be an expressed acknowledgement of an adjudication or can there just be a statement without mentioning an adjudication?

He said the second question is: what is it that a person in such a mental state loses, acknowledging that the committee has considered several formulations, and that the language provided in the report and recommendation is an additional formulation. He said it seems to him that the first choice in the report and recommendation, that the amendment needs to express a need for an adjudication, is a matter of conviction. He said the committee was trying to get at something that addressed people’s concerns rather than retreat to armed camps.

Ms. Bell said that the second issue involves two things, how you phrase it: “mental capacity to vote” was agreed on, and that was one issue. She added, the second issue is whether there is a right or privilege to vote.

Vice-chair Jacobson said he meant to identify mental capacity to vote as a part of the second issue. He said his argument is that the concept of “privileges of an elector” involves doing more than voting. He said only electors can do certain things, adding that the problem he has with saying “rights” is that “we could be seen as deliberately excluding privileges,” which was a word used in the original section. He said he is worried the committee would be saying the only right affected is the right to vote. He said he thinks it is safer and less problematic to refer to the individual’s rights and privileges, whatever they may be, and that it is preferable to be “vague and all-encompassing in our vagueness, because rights and privileges would seem to run the gamut.” He said this phrasing wouldn’t leave anything out. He remarked that this statement differs from what he has suggested before.

Senator Michael Skindell commented that the privileges of an elector are very broad. He said, “for a director to be a director he has to be an elector. If you have a stroke as a director, do you automatically lose your position and your health care benefits?” He continued, asking whether this means that when a stroke victim would gain back his abilities, the governor could reappoint. He said his question is whether the committee has a grasp of what all of the privileges of an elector are. Vice-chair Jacobson said he assumes if that situation has arisen no one has ever enforced this section to permanently remove someone from office.

Ms. Bell said that is one of the things that was addressed by the 1970s Commission, including whether medical testimony would be required to determine whether capacity was present. She said presumably the committee would want the determination to be made by someone who was qualified and could provide medical or psychiatric evaluation. Sen. Skindell said Ms. Bell’s comment touches on the issue of an adjudication, or lack of it. He said he believes there is a

constitutional provision that says a state director has to be an elector. So if someone is not an elector because of a mental incapacity, he cannot serve as a director.

Vice-chair Jacobson said he is concerned that if the committee is worrying about whether someone can't keep their job, the committee is letting the very specific circumstance defeat the general purpose the committee is trying to accomplish.

Sen. Skindell said he has brought this issue up in the past, asking whether the committee has a handle on what the privileges of an elector are. He said the privileges do include signing an initiative or referendum petition, as well as other acts, with other ramifications.

Committee member Doug Cole said he has a more mundane concern: the way it is written in the report and recommendation, the committee has instituted an ambiguity: no person who is X shall have either A or B. Vice-chair Jacobson agreed that the "ands and ors" are not as one might think when it comes to statutory construction.

Representative Ron Amstutz said the committee could say "as well" and it would have the same effect as "and". Vice-chair Jacobson said the Legislative Service Commission would have an opinion on this, and may not agree that is the solution.

Ms. Bell said the committee could change the recommendation as to the rights and privileges concept. She said they could modify the proposed recommendation to read that "No person who [has been adjudicated to lack][lacks] the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity."

Vice-chair Jacobson agreed that the new language proposed by Ms. Bell is meant to be all encompassing, saying everything is either a right or a privilege, or both.

Ms. Bell then moved to change the report and recommendation to read "rights and privileges of an elector." Mr. Cole seconded the motion. Vice-chair Jacobson then asked for discussion. Sen. Skindell asked for clarification of whether the section would read "rights and privileges of an elector," and this was confirmed.

A vote was taken, with all voting in favor except for Sen. Skindell. Vice-chair Jacobson reported that the motion had carried.

The committee then turned to the question of mental capacity as it should be referenced in the recommendation. Vice-chair Jacobson and Ms. Bell agreed that the proposed new section appropriately referenced "mental capacity to vote."

Vice-chair Jacobson then turned to the question of whether the committee needs to put into the constitution the requirement of an adjudication.

Judge Patrick Fischer said he goes back to the minutes the committee just passed, referencing his comments on page four. He said the legislature has not provided for an adjudication of mental capacity, and that, basically, the board of elections in each county handles it. He said the person

whose voting ability is challenged then has to bring a writ of mandamus. He described a writ of mandamus as “a bizarre and unusual writ,” and that the proceedings for a writ are different than for a usual court proceeding. He asked, as a practical matter, when would the adjudication occur, every two or four years when the electoral rolls are cleared? He said the requirement of an adjudication adds something that is just not practical, unless you want to have many cases in the court system. He wondered whether the committee would be creating more problems than it is solving by requiring an adjudication. He said he understands the goal, but that it creates more problems than it actually takes care of.

Ms. Bell said the legislature could determine the appropriate procedure, and that would be in line with the proposals of the 1970s Commission. She added that changes in attitudes toward mental health over time mean that the legislature is in the best position to adopt laws reflecting the latest information, as opposed to attempting to address it in the constitution. She said the solution would be to give the legislature the right to set up procedures, because these are policy issues that are appropriately determined by the legislature.

Vice-chair Jacobson said use of the word “lacks” as opposed to the phrase “has been adjudicated to lack,” would allow the legislature to act. He said his fear is that this will cause prosecutors to have to come into court with a mass of names of persons who are residents of a facility, to say all must be adjudicated to lose the right to vote. He said as a former party chairman he knows that has happened from time to time. He asked “Do you want to make a requirement that the state set up a ‘star chamber’ to consider the mental capacity of its citizens?”

Ms. Bell directed the committee to a quote from the report of the 1970s Commission, indicating a lack of guidance resolving how hearings must be conducted and whether medical evidence would be required. She read from the report that “the lack of procedure for determining who is ‘insane’ or an ‘idiot’ could allow persons whose opinions are unpopular or whose lifestyles are disapproved to be challenged at the polls, and they may lose their right to vote without the presentation of any medical evidence whatsoever.”

Vice-chair Jacobson agreed that this may be an issue but said it is for the General Assembly to determine. Judge Fischer commented that the 1970s Commission issued its recommendation before provisional balloting came into use, and that provisional balloting could take care of that issue rather easily. Ms. Bell said that the provisional balloting form is too complicated. Vice-chair Jacobson disagreed that provisional ballots are a problem, saying there were a lot of provisional ballots counted in the last election.

Vice-chair Jacobson asked whether there were any other arguments or proposed amendments to the wording, and suggested the committee take a vote.

Rep. Amstutz said he thinks the common sense approach allows for an improvement. He said, “for us to improve the provision, the committee needs to use the simple ‘lack’ and not put the word adjudication there.” He said the need for adjudication will arise, but that needs to happen not in language in the constitution.

The committee then took a straw poll on whether to include “has been adjudicated to lack” in the recommendation. Three members of the committee, Ms. Bell, Sen. Skindell, and Representative Kathleen Clyde, voted to include that language. Four members of the committee, Vice-chair Jacobson, Mr. Cole, Judge Fischer, and Rep. Amstutz, voted not to use the phrase “has been adjudicated to lack.”

Mr. Hollon then explained the procedure for approving a report and recommendation. He said this is the first presentation, and that the committee meets again in November. He said at that time the committee will have a new draft of the report and recommendation using the word “lacks” and will indicate the other change as “rights and privileges of an elector.” He said it will be up to the chair and the committee to determine if those changes would result in the report and recommendation being a first reading. He said the other question is whether the rest of the report and recommendation is acceptable to the committee. He said, if not, the committee will make changes if needed.

Ms. Bell suggested, given that the committee has voted 4-3 at one meeting to include adjudication, and now 4-3 to exclude adjudication, whether it would be alright to continue to put both options in the proposed language. Vice-chair Jacobson remarked that the committee, comprised of an even 10 members, will deadlock if all attend and again vote as they have been voting.

Mr. Hollon said if that happens, the committee might let the full Commission determine the question. Vice-chair Jacobson said he is not comfortable passing that duty on to the Commission, saying, from his perspective, the provision can only be done in a certain way, one narrow, the other more broad, and that the versions are not equal. He said he would be uncomfortable in presenting both to the full Commission.

Rep. Clyde asked a procedural question, wondering whether, when the agenda indicates there is a report and recommendation, it is an “action item.” Mr. Hollon answered that, if there is going to be a final vote, it is an action item. He said in this instance, staff is presenting options as a first presentation; it is not the final vote. Rep. Clyde said the process has been a little unclear, wondering what the vote means. She asked whether this is an informal editing process that is getting the committee to language for which the committee has a more formal process. Mr. Hollon said the committee has cinched down the language during the last few meetings.

Vice-chair Jacobson explained that the vote the committee had just taken was not the final vote. Mr. Cole asked whether there would be a roll call vote on the final recommendation, and Vice-chair Jacobson agreed that is what would occur.

Mr. Hollon said that, on the agenda next time, the committee will have this report and recommendation as a second presentation, action item, with language reflecting today’s vote. Vice-chair Jacobson requested that staff also edit parts of the report and recommendation that might be inconsistent with the changes in the language that the committee just adopted.

Sen. Skindell asked what rights and privileges of an elector existed in 1851, both in the constitution and by statute, and wondered if any rights and privileges have been added since

then. He said he feels this is important to his consideration of this issue, because rights and privileges are much broader now than in 1851.

Vice-chair Jacobson commented that the constitution is a living document, and the extent to which there are more privileges today, they are meant to be included and restored. Sen. Skindell said his concern is that, when considering an amendment to this provision, should the committee consider the rights and privileges of an elector that are different than they were in 1851. He said, “if, now in statute, the General Assembly says a judge has to be an elector, and that judge has a stroke and is temporarily incapacitated, does that mean he has to forfeit his office? Or does he remain in office during that mental incapacity.”

Vice-chair Jacobson said Sen. Skindell is talking about a different provision of the constitution and its impact on statute. He said what “rights and privileges” means is not governed by this section of the constitution. Sen. Skindell said his point is that the “rights and privileges of an elector” has changed since 1851, and what he is suggesting is the committee needs to understand that when discussing mental incapacity.

Judge Fischer said the word “elector” is important because of the United States Constitution. He said in 1803 and 1851, constitutional convention delegates were trying to make the Ohio Constitution consistent with the U.S. Constitution. He said he concluded that eliminating “elector” would be a mistake.

Sen. Skindell said, with regard to mental capacity, he is not comfortable taking away the right to vote and privileges of an elector. He said he wants to be sure the committee is considering this.

Rep. Amstutz said what Sen. Skindell is arguing is how a court would interpret the particular situation he described, but the question of whether the person is qualified at the outset is different from if something affects the person’s mental capacity.

Sen. Skindell said if a person lacks the mental capacity to be an elector, the definition of “elector” is different than it was in the 1800s.

Senior Policy Advisor Steven H. Steinglass said that the word privilege is only used five or six times in the 1851 constitution, mostly outside of this context. He said it was not used in Article V, Section 1, but was used in Section 4 for felon disenfranchisement, and in Section 6. He said privilege is not a word that runs through the constitution outside of the one article the committee is looking at. He said the question may be different regarding statutory law.

Mr. Cole referenced one statute, Ohio Revised Code 1907.13, “Qualifications of County Court Judges,” that references being an “elector.” He said he can see the point that if a person has lost the rights and privilege of an elector he is no longer a qualified elector. But, he wondered, what clarity can the committee get on this?

Vice-chair Jacobson said he understands the concern, but the question asked for research will illuminate the question. He wondered whether the committee needs to clarify what specific rights and privileges one might lose by losing the ability to be an elector.

Mr. Cole said this is a statutory problem. Judge Fischer said if one is unable to vote, he shouldn't be a judge. Sen. Skindell expressed his concern that a stroke victim, even after rehabilitation, could forfeit his office. Mr. Cole said that is a statutory problem. Sen. Skindell continued that his point is that the law is different from 1851.

Vice-chair Jacobson said he is unaware this issue has ever come up. He said the committee is being careful about specifically saying "during the incapacity." He said the General Assembly should change the law if it is a problem.

Ms. Bell asked whether the question really relates to the policies that exist regarding leave and illness. She said there are protections available under the law, for example the Americans with Disabilities Act.

Sen. Skindell maintained that the committee needs to have an understanding of the meaning of "rights and privileges" before acting. He asked if staff could provide research on that question. Vice-chair Jacobson said the chair would have to request this. Mr. Hollon said he would consult Chair Saphire about the research question.

Committee Discussion:

Article V, Section 4 (Felon Disenfranchisement)

Vice-chair Jacobson then turned the committee's attention to the question of felon voting under Article V, Section 4 (Felon Disenfranchisement). Mr. Hollon said in the summer of 2014, the committee had held a straw vote to keep the language in the provision, but then Professor Douglas A. Berman from the Ohio State University Moritz College of Law presented to the committee on the section in October 2014. He said the committee had not held a great deal of discussion after that. He said staff needs to know whether the committee wants to keep Section 4 as is, or whether there is some suggestion about changing the language.

Judge Fischer said Prof. Berman wanted to know if there could be a provision for someone to petition the governor to be able to vote while in prison. Vice-chair Jacobson said the General Assembly has the right to make the decision on restoration of voting rights for felons. He asked whether the governor should have that right.

Mr. Cole observed that the General Assembly could provide for that by statute now, but the question is whether the constitution should say that.

Mr. Hollon said staff needs a preliminary indication of the committee's intention on this question. He said the committee did say keep the section as it is, but wondered whether that had changed after Prof. Berman's presentation.

Mr. Cole moved to recommend retaining the section as is, and Ms. Bell seconded. The committee voted unanimously to retain the section as is. Mr. Hollon then said next time staff will provide the committee with a first presentation of a report and recommendation recommending retention of Article V, Section 4 as is.

Article V, Section 1 (Who May Vote)

Vice-chair Jacobson then directed the committee to the last item on the agenda, which was a discussion for the first time of Article V, Section 1 (Who May Vote). Vice-chair Jacobson suggested the committee may want to look at the section's listing of political subdivisions, asking what that means and whether it could be revised. He said the issue could be put on the agenda for next time, and Mr. Hollon suggested staff could prepare a memorandum on the section.

Mr. Cole noted the difference in the language between Section 1 and the statute he had referenced (R.C. 1907.13) about qualifications to run for judge. He said the constitutional provision refers to "qualifications of an elector," while the statute refers to having to be a "qualified elector." He said the difference in those two phrases might suggest a solution to Sen. Skindell's concerns.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:50 a.m.

Approval:

These minutes of the September 10, 2015 meeting of the Bill of Rights and Voting Committee were approved at the November 12, 2015 meeting of the committee.

/s/ Richard B. Sapphire

Richard B. Sapphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, NOVEMBER 12, 2015

Call to Order:

Chair Richard Saphire called the meeting of the Bill of Rights and Voting Committee to order at 9:38 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Amstutz, Bell, Clyde, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the September 10, 2015 meeting of the committee were approved.

Reports and Recommendations

Article I, Section 20 (Powers Reserved to the People)

Chair Saphire recognized Shari L. O'Neill, counsel to the Commission, who provided the first presentation of the report and recommendation for Article I, Section 20 (Powers Reserved to the People). Ms. O'Neill indicated that Article I, Section 20, stating that the powers retained by the people will not be impaired or denied by the enumeration of other rights in the constitution, was adopted as part of the 1851 Ohio Constitution. She described that the section mirrors language from both the Ninth and Tenth Amendments to the United States Constitution, and expresses the view that the powers of the government are derived from the people. She indicated the report and recommendation describes the history of the limited litigation involving the provision, with courts generally citing Article I, Section 20 only in conjunction with other sections of the Bill of Rights. Ms. O'Neill said the report and recommendation concludes that the committee recommends that Article I, Section 20 be retained in its current form.

Senator Michael Skindell moved to recommend no change to Article I, Section 20. This motion was seconded by Judge Patrick Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

Article V, Section 4 (Exclusion from Franchise for Felony Conviction)

Ms. O'Neill then provided the first presentation of the report and recommendation for and Article V, Section 4 (Exclusion from Franchise for Felony Conviction). Ms. O'Neill indicated that this section relates to the power of the General Assembly to exclude from the privilege of voting or being eligible to office any person convicted of a felony. She said the provision was adopted as part of the 1851 Ohio Constitution, and was amended in 1976, after a recommendation by the Ohio Constitutional Revision Commission to substitute the word "felony" for the phrase "bribery, perjury, or other infamous crime." Ms. O'Neill described that the section empowers the General Assembly to enact laws that exclude felons from voting or holding office, rather than directly disenfranchising, and that the General Assembly enacted laws on this topic in Ohio Revised Code Chapter 2961. Referring to litigation involving the subject of felon disenfranchisement, Ms. O'Neill noted the report and recommendation discusses case law upholding the disenfranchisement of felons on the basis that the Fourteenth Amendment to the United States Constitution guarantees the right to vote "except for participation in rebellion, or other crime," thus finding an "affirmative sanction" for felony disenfranchisement, and that the section has been cited in Ohio in relation to its restriction on eligibility for public office of persons convicted of a felony. Ms. O'Neill stated the report and recommendation describes the committee's discussion of the issue, documenting its consensus that Ohio's disenfranchisement of felons only during the period of their incarceration is a reasonable approach that appropriately balances the goals and interests of the criminal justice system with those of incarcerated felons.

She said the report and recommendation sets forth the committee's conclusion that the provision should be retained in its current form.

Upon motion by Judge Fischer, with second by Vice-chair Jeff Jacobson, the committee voted unanimously to recommend no change to Article V, Section 4.

As a point of order, Chair Sapphire then asked the committee whether it would be in favor of issuing the two reports and recommendations after only one presentation, as is now permitted by the Rules of Procedure and Conduct in circumstances in which the committee is recommending no change. There being no objection, Mr. Jacobson then moved that the initial vote recommending no change to Article I, Section 20 be vacated, which was seconded by Judge Fischer. Without objection, the motion was agreed to. Sen. Skindell then moved to issue the report and recommendation recommending no change to Article I, Section 20, and that it be retained in its current form. This motion was seconded by Judge Fischer, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article I, Section 20.

There being no objections to having only one presentation of the report and recommendation for Article V, Section 4 before forwarding it to the Commission, Judge Fischer then moved to issue the report and recommendation for no change to Article V, Section 4, and that it be retained in its current form. This motion was seconded by Mr. Jacobson, and a roll call vote was held. By unanimous vote of all present at the time of the vote, the committee voted to issue the report and recommendation for Article V, Section 4.

Committee Discussion:

Article V, Section 6 (Mental Capacity to Vote)

Chair Sapphire then turned the committee's attention to its review of Article V, Section 6, relating to the mental capacity to vote. Noting that he had not attended the committee's previous meeting on September 10, 2015, Chair Sapphire said that his review of the meeting minutes caused him to understand that the vote taken at the last meeting was a straw poll rather than a final vote, so that no first presentation of a formal report and recommendation had occurred.

Mr. Jacobson objected to this characterization, saying it was clear in the previous meeting that the presentation of the report and recommendation was the first reading. He cautioned that, if each time the wording of the recommendation is changed another "first presentation" is required, there could be no progress in the work of the Commission. He said the committee took a straw poll because it was trying to finalize the text of its recommendation.

Committee members then expressed different views regarding the effect of the discussion and vote taken at the last meeting. Chair Sapphire asked the committee for a motion that would allow the committee to reach a formal conclusion about whether the presentation at the current meeting constitutes a second hearing.

Mr. Jacobson moved that the presentation on November 12, 2015 constitutes a second hearing. Committee member Doug Cole seconded the motion, and discussion on the motion was held.

Committee member Karla Bell expressed that the vote changes at each meeting because a different majority is present.

Mr. Jacobson clarified that the committee is not voting on the recommendation, but is voting about whether this is the second presentation. He said the problem is not that the committee hasn't given it enough consideration, but that it is focusing on side issues, and missing the opportunity to remove language that doesn't belong in the constitution. He said if the committee can't compromise here, it hurts the whole process.

Chair Sapphire said he disagrees that these are side political issues, but agreed the committee should vote on whether this is a second hearing.

Mr. Cole said he agrees with the underlying sentiment that these issues have been fully vetted, and he believes the committee is in a position to vote. He said this is not a situation where there is a lack of information.

Representative Kathleen Clyde said she agrees that the committee did take a formal procedural vote at its last meeting. She said there are substantive differences that may delay the committee, but she said she agrees that a first action was taken.

The committee then took a roll call vote of the committee members present. The following committee members were in favor of declaring that the presentation on November 12, 2015 constituted a second hearing:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Rep. Clyde
Doug Cole
Judge Fischer
Sen. Skindell

The following committee member was opposed to declaring that the presentation on November 12, 2015 is a second hearing:

Karla Bell

Chair Saphire then recognized Wilson R. Huhn, professor emeritus at the University of Akron School of Law, who spoke on behalf of the American Civil Liberties Union of Ohio (“ACLU”) regarding the committee’s consideration of Article V, Section 6 (Mental Capacity to Vote).

After describing the constitutional due process requirements relating to the right to vote, Professor Huhn advocated for removing Article V, Section 6, saying the General Assembly would still retain the ability to establish procedures for denying the right to vote to persons who are incapable of voting.

Chair Saphire said the presumption is that if someone satisfies the qualifications listed in Article V, Section 1, and no other constitutional provision limits the person’s voting rights, the person constitutionally is entitled to vote. He asked, if that is so, where does the General Assembly get its authority to step in and limit the right to vote? Prof. Huhn answered that these provisions speak to the constitutional rights of the individual, rather than being a limitation on the powers of the government. He said the government always retains the ability to limit constitutional rights so long as there is a compelling governmental interest. He said the right to vote similarly could be limited to protect the integrity of the electoral process.

Seeking further clarification, Chair Saphire asked whether the General Assembly has the inherent authority to step in. Prof. Huhn said the government retains its police powers, and that

limiting the right to vote would be necessary to prevent some people from voting who have extreme mental incapacity.

Mr. Jacobson noted that legislative actions can be interpreted in ways that may not have been intended by their drafters, wondering if the same thing could happen when a provision in the constitution is enacted. He asked, if Article V, Section 6 is removed, could a court decide that meant the people of Ohio no longer wish their legislature to exercise that authority?

Prof. Huhn agreed that is a possible interpretation. He said a court could say to enact one is to exclude the other, or could conclude voting is a right and there is no intent to limit the legislature.

Ms. Bell said she agrees removal is the best, but doesn't think that option will win. She noted Prof. Huhn's comment that if Article V, Section 6 can't be abolished, the committee could track the language proposed by the 1970s Constitutional Revision Commission, which stated that the General Assembly has the power to deny the right to vote. She asked why Prof. Huhn would recommend that.

Prof. Huhn said that is his backup, or alternate, phrasing for the section. He said he would recommend requiring an adjudication because every person has a fundamental right to self-govern, noting only a small percent of persons fall into the category of severely impaired. He said, on a theoretical level, he sees all of those people as equals, but because there is a compelling governmental interest they could be adjudicated unable to vote.

Mr. Cole noted that Prof. Huhn seems to believe it would be appropriate to prevent some mentally impaired people from voting, asking what Prof. Huhn finds inappropriate about the language the committee is considering that would accomplish that result.

Prof. Huhn answered that the right to due process is fundamental; it is a due process concern that makes him want to include the word "adjudication" in the provision.

Mr. Cole said the federal constitution imposes restrictions on limitations on the franchise as well as providing substantive and procedural due process. He wondered whether the proposed constitutional language could be interpreted as being consistent with federal restrictions.

Prof. Huhn said the integrity of the electoral process is important, but so is the dignity of the persons involved. He said the notion that a person could be challenged and prevented from voting without a prior adjudication is very troubling to him.

Mr. Cole asked whether there is anything in the proposed language that would prevent the use of an adjudicative process. Prof. Huhn answered there is nothing to prevent it but also nothing to require it.

Judge Fischer noted the procedure whereby someone contesting the ability of another to vote must file a protest with the board of elections 20 days before the election and, if someone doesn't

like the result, a writ of mandamus must be sought. Prof. Huhn said that procedure does not constitute an adjudication by an appropriate body, and that an administrative agency lacks the expertise to determine mental capacity.

Judge Fischer continued, saying that is what the legislature has put into effect; he doesn't like it, it is an unusual process, but it is a process. Prof. Huhn said he does not know much about that procedure, but he doubts it satisfies due process. He said the board of elections is not appropriate for conducting an adjudication in this context, giving an analogy that a person is not determined to be a felon (and so unable to vote) by a board of elections but by a criminal proceeding in a court.

Sen. Skindell remarked that the difference, in part, between the existing provision of the constitution and the provision under consideration is that the version under consideration just has "mental capacity to vote," while the existing provision says "no idiot or insane person." He asked, "is there a difference between 'mental capacity' and 'idiot or insane'?"

Prof. Huhn said he doesn't know what was meant by idiot in 1851, but by 1910 it was someone with an IQ of less than 25. He said "if you take it literally and use the medical definition of the time, that phrase substantively was okay." He said "mental capacity" means far more than that. He said experts use methods to evaluate performance that are far more than a simple IQ test, adding that people have abilities based on living skills, communication skills, and common sense.

Following up, Sen. Skindell said, hypothetically, or practically, using the term "mental capacity" is a lot broader, and would exclude a larger group. Prof. Huhn agreed with this statement.

Prof. Huhn noted that the use of the word "privilege" would be adequate to cover the right to vote. He said "privilege" is an archaic term used to determine this kind of constitutional right. He said, to modern ears, the word privilege sounds like something that can be taken away, and that it would be better to call it the "right to vote."

Mr. Jacobson followed up on this statement by asking whether Prof. Huhn was implying that activities referred to as "privileges" are something other than a right. Prof. Huhn said historically privileges were government-sponsored activities that all male adult citizens had the ability to participate in, for example running for office or serving on a jury. He said "immunities," (as in the "privileges and immunities clause") were freedoms.

Mr. Jacobson said he concedes there must be some kind of procedure before someone goes to the poll and asks for a ballot, but his concern is that the use of the word "adjudicated" implies some sort of process in front of a judge, involving counsel and other formal procedures. He asked whether Prof. Huhn would find it acceptable to require a prior determination, possibly a process set up by the General Assembly.

Prof. Huhn said a constitution will be interpreted according to the intent of the people who wrote it. He said before someone is committed to an institution, there must be notice and a hearing.

He said, for example, in a guardianship setting, the burden of proof is on those seeking to impose the guardianship. He said the constitution places the burden of proof on the government and that it is very important for the constitution to say there should be an adjudication.

Ms. Bell noted that there is a guarantee of the civil rights of patients contained in a Revised Code section relating to persons who are admitted to a hospital or taken into custody. She said in that instance, the General Assembly requires a separate adjudication prior to depriving someone of a right to vote.

Prof. Huhn then concluded his remarks, and Chair Sapphire thanked him for his presentation.

Ms. Bell then asked if Michael Kirkman, executive director of Disability Rights Ohio, who was present in the audience, could answer some questions. Chair Sapphire then recognized Mr. Kirkman.

Ms. Bell asked Mr. Kirkman about the board of elections procedure for preventing persons from voting. Mr. Kirkman said there is a process for this, but he is not sure what the standard is for disqualifying someone. Ms. Bell asked what kind of notice is given when someone is taken off the voting rolls, and whether notice by publication is sufficient. Mr. Kirkman said notice by publication is sufficient as a last resort, but that notice procedure has to do with disqualifying someone because of a change in residency, which is not this situation.

Chair Sapphire inquired about Mr. Kirkman's statement, in his November 10, 2015 letter to the committee, that he sees adjudication as a side issue. Mr. Kirkman answered that, prior to disenfranchisement, some kind of hearing process is going to happen anyway because it is required under federal law. Chair Sapphire said he is more concerned with the burden of proof than with the actual process afforded the individual, because the burden on the individual can be severe if voting rights are removed prior to an adjudication and the individual has to initiate litigation to get his rights back.

Mr. Kirkman said there is dispute about what "capacity to vote" is. He said he continues to be bothered that felons have more rights in the constitution than people with disabilities, and that the burden of proof is on the person least likely to be able to challenge the disenfranchisement. He said Article V, Section 4 is a good template because it acknowledges the role of the General Assembly in deciding exactly what circumstances should affect voting rights in this context.

Mr. Jacobson suggested to the committee a revision of the language under consideration, as follows:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined to lack the mental capacity to vote.

Chair Sapphire said the language would be improved if it said "determined according to procedures determined by the General Assembly."

Mr. Cole said he appreciates Mr. Jacobson's efforts, but his concern is that on this issue the committee is having difficulty differentiating a statutory process from a constitutional process. He said the fewer words the better, adding "it doesn't serve us to ensconce in the constitution too much nuance and statutory construct. The fundamental notion we are trying to express is that those who lack the capacity to vote shouldn't vote. If we try and create too much statutory construct around that it is hard to understand. Also what we are trying to put there is part of due process protections there already."

Ms. Bell said she agreed with a statement made by Executive Director Steven C. Hollon in a previous memorandum to the committee that the use of the term "adjudication" suggests a decision made by a judicial body and that due process has been met, and also that it puts the burden on the state, rather than on the voter. She said adjudication shifts the burden to the state to be sure it has proven its case.

Chair Sapphire suggested the committee adjourn until next time because it was the scheduled time for the meeting to conclude. Mr. Jacobson objected, indicating that the committee should continue to discuss the issue in order to bring the topic to a conclusion. He then made a formal proposal for new language:

The General Assembly shall have the power to exclude from the rights and privileges of an elector during the time of incapacity any elector who is determined under law to lack the capacity to vote.

Judge Fischer commented that it is important that the committee change the offensive language in Article V, Section 6. He said, "this committee has spent months on this issue; there are a lot of issues important to this committee, and it is time to move on one way or another."

Mr. Cole said he has a procedural concern, indicating if the committee is completely rewriting the language, he would struggle with calling this a second reading. He asked whether the committee could vote on whether to adopt the language that came out of the previous meeting and see if there is a majority in favor of it.

Mr. Cole then moved to adopt the language approved at the last meeting, which was seconded by Judge Fischer. The committee then held a discussion on the motion.*

Mr. Jacobson said he thinks there is majority support for language from the last meeting. He said it could be helpful to clarify that there should be some prior determination, but that his concern about adjudication is that it requires a formal court process. Adding that requirement of a prior determination would help reach a broader consensus, he agreed that the committee has considered this a long time. He said the committee could save seeking a broader consensus for the Commission as a whole, if people would prefer.

* That language states: "No person who lacks the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity."

Ms. Bell said the committee has been deadlocked on this issue; it is evenly split depending on who shows up. She said she is concerned the committee would be in a position of sending to the Commission a recommendation that is disapproved by a significant portion of the committee. She said she could support Mr. Jacobson's proposal.

Chair Sapphire said he agrees with Fischer, Cole, and Ms. Bell. He said, if he had to vote on the current proposal he would move against it, but that he could support Mr. Jacobson's proposed language.

Mr. Jacobson said he wishes the committee could wrap this up today. Mr. Cole said he doesn't believe the committee can rewrite the proposal and call it a second reading.

Chair Sapphire reminded the committee there is a motion on the floor. Ms. Bell moved to amend the motion and instead adopt the language suggested by Mr. Jacobson. Chair Sapphire then asked for a second, but none was provided at that time.

Rep. Amstutz then suggested another wording of the language that would include the phrase "the General Assembly shall exclude..." Thus, it would read:

The general assembly shall exclude from the rights and privileges of an elector during the time of incapacity an elector who is determined under law to lack the mental capacity to vote during the period of this incapacity.

Mr. Jacobson said the problem with that phrasing is that it uses the word "elector" twice. Judge Fischer suggested using the language originally proposed, but add at the beginning that "the General Assembly shall provide under law that..."

Mr. Jacobson agreed to this change, and offered the following:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Chair Sapphire asked whether this would constitute a second reading, adding whether or not it is a second reading, there is nothing to preclude a third reading.

Mr. Jacobson then made a substitute motion that the motion regarding his former proposal be stricken. This motion was seconded by Ms. Bell.

Ms. Bell then withdrew her motion to amend.

Mr. Jacobson then moved to amend the original motion, and that the following language be adopted by the committee:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

A roll call vote of the committee members present was taken on the motion to amend. The following committee members were in favor of amending the motion:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Karla Bell
Doug Cole
Judge Fischer
Sen. Peterson

The following committee members opposed to amending the motion:

Rep. Clyde
Sen. Skindell

Sen. Skindell asked for clarification as to whether the report and recommendation was subject to a final vote to be referred to the Commission, to which Chair Saphire answered no.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:15 a.m.

Approval:

These minutes of the November 12, 2015 meeting of the Bill of Rights and Voting Committee were approved at the March 10, 2016 meeting of the committee.

/s/ Richard B. Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 10, 2015

Call to Order:

Vice-chair Jeff Jacobson called the meeting to order at 9:41 a.m., indicating that Chair Richard Saphire had been delayed and had instructed him to begin the meeting.

Members Present:

A quorum was present with Vice-chair Jeff Jacobson, and committee members Amstutz, Clyde, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 meeting of the committee were not reviewed before the meeting was adjourned.

Adjournment:

Vice-chair Jacobson noted that the purpose of the meeting had been to review and possibly vote on a report and recommendation for Article V, Section 6 (Mental Capacity to Vote). He explained that committee members had been working toward a compromise version of recommended new language for the section. He continued that, however, in the absence of committee member Karla Bell, additional questions about the draft language would be unable to be resolved at this meeting. Vice-chair Jacobson then indicated that he had been in telephone contact with Chair Saphire, who had agreed that the committee was not ready for a vote at this time. Vice-chair Jacobson said that Chair Saphire agreed that the committee should not act on the recommendation this month, but by its next meeting the committee should have resolved the last remaining drafting issue.

With no further business to come before the committee, the meeting adjourned at 9:50 a.m.

Approval:

These minutes of the November 12, 2015 and December 10, 2015 meetings of the Bill of Rights and Voting Committee were approved at the March 10, 2016 meeting of the committee.

/s/ Richard B. Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 10, 2016

Call to Order:

Chair Richard Saphire called the meeting to order at 9:38 a.m.

Members Present:

A quorum was present with Chair Richard Saphire, Vice-chair Jeff Jacobson, and committee members Amstutz, Bell, Cole, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the November 12, 2015 and the December 10, 2015 meeting of the committee were approved.

Presentations:

Chair Saphire began by introducing Veronica Scherbauer and Amy O'Grady from the Office of the Attorney General, who were present for the purpose of introducing the committee to the topic of human trafficking in relation to Article I, Section 6 (Slavery and Involuntary Servitude).

Ms. Scherbauer identified herself as a member of the community outreach team and the coordinator for criminal justice initiatives for the attorney general's office. She said in that role she coordinates the office's community outreach efforts related to human trafficking issues.

Ms. Scherbauer identified human trafficking as "modern day slavery," noting that slavery did not end with the Emancipation Proclamation but continues today. She said it is estimated that 21 million people are victims of forced labor around the world, with 4.5 million of them being victims of forced sexual exploitation. She said these "most vulnerable people in our society" suffer silently as traffickers reap the benefits. She indicated traffickers generate over \$150

billion a year in illegal profits in labor sectors that include domestic work, agriculture, construction, manufacturing, and entertainment.

Ms. Scherbauer said Ohio House Bill 262, passed in 2012, requires local law enforcement to collect human trafficking information and forward it to the Ohio Bureau of Criminal Investigation. She said, according to Ohio data from 2015, there were 102 human trafficking investigations resulting in 104 arrests and 33 convictions. She stated that, during that time, local law enforcement identified 203 victims of human trafficking, with many under age 21 and some as young as 12.

Ms. Scherbauer then concluded her remarks, and Chair Sapphire thanked her for her presentation.

Chair Sapphire asked whether, under Ohio law, trafficking is addressed in the context of kidnapping, or whether there are special criminal statutes for trafficking. Ms. Scherbauer said there are statutes specifically governing trafficking, explaining that these statutes are being used to prosecute human traffickers.

Committee member Ed Gilbert said it is his understanding Ms. Scherbauer is explaining slavery and involuntary servitude, asking how slavery is being defined.

Ms. Scherbauer answered that slavery is forcing people to work for another against their will. She said, essentially the individual being trafficked is being forced either physically or psychologically.

Mr. Gilbert said he would advocate that Article I, Section 6 remain, but asked, if it were removed, how that might affect the work of the attorney general's office in prosecuting trafficking cases. Ms. Scherbauer answered that people believe slavery does not exist today, but that it is essential to communicate that it does exist and that government is serious about the issue. She said the topic needs to remain relevant and in front of everyone today.

Committee member Karla Bell asked whether cases involving prostitution due to drug addiction would also be considered trafficking cases. Ms. Scherbauer said every investigation is different, but that there must be a commercial aspect for a case to be considered trafficking.

Chair Sapphire wondered whether there is a way to revise the provision to improve responsiveness to the problem of human trafficking. He asked if Ms. Scherbauer is aware of states that have dealt with trafficking in their state constitutions. Ms. Scherbauer said her office would need to explore these questions more in depth. She explained that human trafficking is a newer issue, with the first federal law not being passed until 2000, suggesting that states may not have altered their constitutions yet.

Mr. Gilbert asked whether Ms. Scherbauer would agree that taking this language out of the constitution would send a wrong signal. Ms. Scherbauer said it is important to bring more attention to the problem.

There being no further questions, Chair Sapphire thanked Ms. Scherbauer and asked her to provide the committee with any information she might obtain regarding constitutional activity on this issue in other states.

Executive Director Steven C. Hollon explained to the committee that, although staff provided a draft of a report and recommendation on Article I, Section 6, it was not being submitted for a first presentation because this was the committee's first opportunity to hear presentations or engage in discussion on the matter.

Chair Sapphire asked the committee whether it had comments or questions regarding the draft report and recommendation.

Mr. Gilbert asked whether the committee had previously expressed an intention to recommend removal of the provision, to which Chair Sapphire replied in the negative.

Mr. Hollon explained that, at next meeting, staff could complete the unfinished portion of the report and recommendation and bring it to the committee as a first presentation.

Chair Sapphire then asked whether members of the public wished to provide comments about Article I, Section 6. He recognized Representative Emilia Sykes, a member of the Commission but not a member of the committee, who explained she was appearing on behalf of the Ohio Legislative Black Caucus.

Rep. Sykes urged the committee to take under careful consideration the language in Article I, Section 6. She said the caucus is mindful and sensitive to the issue and wants to be sure Ohio is taking a stand against slavery in all its forms. She said the caucus wants to be sure the committee has thoughtful and reasonable dialog concerning the provision, assuring that there are no injustices and protecting the welfare of all Ohio citizens.

Chair Sapphire asked whether there are suggestions or ideas from the caucus.

Rep. Sykes said the caucus will be submitting something in writing, explaining its members have been engaged in town halls across the state. She said a portion of the provision that allows involuntary servitude "for the punishment of crime" was a subject of discussion on their tour. She said the language from the Thirteenth Amendment of the United States Constitution is more detailed, and that the caucus would like the committee to consider making the provision as strong as it can be.¹ Chair Sapphire noted that the issue will be on the agenda for the next meeting, and welcomed Rep. Sykes or other interested parties to submit information on the topic.

Mr. Gilbert asked whether Rep. Sykes would be suggesting new language. Rep. Sykes said the caucus is working on that, adding the caucus hopes to work with members of the committee to be sure that any suggested change reflects that Ohio is taking a strong position against slavery.

¹ The Thirteenth Amendment reads, in part: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Mr. Gilbert asked how many presentations of the report and recommendation would occur. Mr. Hollon explained the committee could have its first presentation at its May meeting, which could be the only presentation if no change is recommended. He added that, if there is a desire to explore new language, there could be additional presentations at the direction of the committee.

Mr. Gilbert observed that if Rep. Sykes wished to suggest a modification to the section, it would be helpful to have that language before the May meeting.

Committee Discussion:

Article V, Section 6 (Mental Capacity to Vote)

Chair Sapphire then turned the committee's attention to a report and recommendation for Article V, Section 6, relating to the mental capacity to vote. Thanking staff and members of the committee for efforts to improve the proposed language, he said the committee now has a report and recommendation that is being presented for a final consideration and vote. Chair Sapphire described that the committee has been dealing with the issue for a year and a half, and called for a motion to issue the report and recommendation.

Committee member Patrick Fischer moved to issue the report and recommendation, with committee member Doug Cole seconding the motion.

Vice-chair Jacobson then read the proposed new section to the committee:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Chair Sapphire then invited discussion on the motion.

Summarizing the committee's work on the revision, Mr. Jacobson said the issue has been difficult in some ways. He said everyone agreed that the words "idiots and insane persons" do not belong in the constitution. He said the committee also agreed that poll workers or others should not arbitrarily determine mental incapacity as a way of depriving someone of the ability to vote. However, he said the committee has struggled with how best to convey this concept. He said there is a general agreement that the constitution should not require an adjudicatory action, but that it should be left to the General Assembly to determine the right process or procedure. He added some committee members wanted to tell the General Assembly what to adopt while others wanted to leave it open. He said "under law" conveys that it is not an arbitrary act, but that the committee still struggled in reaching a further consensus.

The committee then discussed an alternative draft of proposed language that reads:

The General Assembly shall provide that no person who, pursuant to the statutes enacted, is determined to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Commenting on this alternative, Judge Fischer said in November 2015 the committee had a seven-to-two vote on the language in the current report and recommendation, indicating that the phrase “under law” was good. He said the phrase “pursuant to statutes enacted” cuts out court involvement as well as secretary of state directives because it takes out the word “law.” He said, “under law” takes into account statutes, directives, and court decisions. The phrase “pursuant to the statutes enacted” is limiting, and could harm people the committee is trying to protect. He said he concluded the language “under law,” agreed to in November, is better.

Mr. Cole said he agrees with Judge Fischer, but for slightly different reasons. He said he would be opposed to saying “pursuant to the statutes enacted” for the reason that it seems repetitive of what is already there in the language the committee had agreed to.

Chair Sapphire said the committee had hoped to have a representative from the secretary of state’s office here to talk about what the secretary of state does in this area. He said his current understanding is that under existing Ohio law, the only way to disenfranchise is through an adjudication by a probate court, and that no secretary of state or public official has the authority to disenfranchise. He said, if he is correct, then by definition there would be due process, and under existing law the only way someone will be disenfranchised would be after an adjudication. He said that understanding affects the way he approaches this issue now.

Ms. Bell said she is not sure she follows the legal analysis, and that the proposal says the General Assembly is charged with determining what factors would result in someone being considered incompetent. She said anyone who meets those standards would be disenfranchised.

Judge Fisher clarified that the phrase “pursuant to statute” would remove authority from two different entities that deal with election law because “you have statutes, you have case law, and you have secretary of state directives. You are cutting out two other parts of the government.”

Mr. Jacobson said, in working on a new draft of the language, it was not the intention to do that. He said the consensus was not necessarily to require a prior adjudication. He said the goal was to say this is not an arbitrary or capricious action.

Mr. Gilbert said he agrees with Judge Fischer’s analysis, but that is why when the committee started this process he thought it was important to find some related interpretation of the Americans with Disabilities Act (ADA), but that there was nothing out there to provide that information. He said “we are not going to agree on the language,” adding that voting “is a basic right we should not be playing around with, and [the provision] should be stricken.” He said “the ADA is up in the air on this and we are asking for trouble” to continue to have such a provision in the constitution.

Mr. Cole asked how members who support the phrase “pursuant to statutes” believe it changes or provides a benefit. Ms. Bell said it provides flexibility for the legislature to decide whether to require a hearing. She said there had been so much concern about not requiring an adjudicatory determination that the idea was to hand it to the legislature to determine appropriate procedures.

Mr. Cole acknowledged that point, but said the phrase “the General Assembly shall provide” covers that concern for him. He said because the issue is subject to federal overrides, there are limits to how much Ohio can deviate. He said the language does not change anything about the ultimate path. He noted, regarding Mr. Gilbert’s support for removing the provision entirely, he fails to see what that would achieve. He said the federal protections already exist, and that Article V, Section 6 is an independent statement of the view of the citizens of Ohio that mental incapacity should disqualify.

Responding to Mr. Gilbert, Chair Saphire said the committee discussed removing the provision, but most members were not in favor of that. He said one concern is if the provision is eliminated there can be no way to prohibit someone from voting even if they are incompetent. He said, in that instance, anyone would be entitled to vote, but members of the committee had concerns about that idea, believing that there are at least some people who should be precluded from voting.

Mr. Gilbert expressed concern that the inability to define what would constitute “mentally incapacitated for the purpose of voting” should prevent a constitutional provision on the issue.

Judge Fischer suggested that the committee keep the provision as broad as possible for as long as possible. He added that the provision is 150 years old. He said, using the phrase “under law” is broader, and, as time evolves, things may change as more is learned about mental health. He said the draft using the phrase “under law” allows the General Assembly, the courts, or the secretary of state to change the law to reflect changes in thinking about the issue.

Mr. Jacobson said he thinks it is important to get rid of the current language, but at the same time he does not want to preclude what has developed in Ohio because it has not yielded bad results. He said he is heartened to hear there are judicial procedures that are followed. Because of this, he said, the constitution does not have to specify the adjudicatory procedure, adding that it also means the legislature has developed an appropriate approach that is working, as suggested by the absence of court cases. As a result, he said, disenfranchisement cannot be done in an arbitrary way, making him more comfortable with the language approved in November.

Committee member Representative Ron Amstutz said, in his opinion, both versions have redundancy but just of a different kind. He said he could live with either one, and does not agree with Judge Fischer in terms of language. He said the phrase “under law” could be eliminated with the same result. He said he is fine using the phrase “under law.”

Ms. Bell said Judge Fischer’s remarks persuaded her that there are disadvantages to limiting the language to statute. She said she would like to hear more about procedures that are actually followed by elections officials.

Chair Saphire said his understanding is that that, under current law, the exclusive way to disenfranchise is through adjudication by the probate court. He said it cannot be done formally or informally by election officials or anyone else, because under existing law that is the only mechanism.

Mr. Gilbert observed that when the committee first considered the issue, the main problem was viewed to be the language “idiots and insane persons.” He said the committee wondered how the provision was being interpreted, but there was no case precedent. He said that is why he thinks the section should be stricken.

Senior Policy Advisor Steven H. Steinglass said there are not a lot of cases because issues have not risen to the point of generating the cases. He suggested the committee is making the issue more complicated than it needs to be, and complimented the “under law” version of the proposal as a “beautiful compromise.”

Chair Saphire commented that the committee does know, based on testimony by Disability Ohio Executive Director Michael Kirkman, that this is not an issue that arises frequently, if at all, in the state. Chair Saphire noted a comment at a previous meeting by Mr. Jacobson that the committee should not feel a need to get something perfect to deal with a problem that largely does not exist.

Mr. Jacobson then called the question.

Chair Saphire noted that Senators Bob Peterson and Michael Skindell had needed to leave the meeting early, but might be able to return if they were needed for the vote. Contact with the senators’ offices revealed the senators would be unable to return to the meeting, and so Chair Saphire opted to proceed without them.

The committee then held a roll call vote on the question of whether to issue the report and recommendation for Article V, Section 6 (Mental Capacity to Vote). Specifically, the report and recommendation recommended the following language to substitute for the current provision disenfranchising persons identified as “idiots” and “insane persons”:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

The roll call vote of the committee members present revealed the following members in favor of issuing the report and recommendation:

Richard Saphire
Jeff Jacobson
Rep. Amstutz
Karla Bell
Doug Cole
Judge Fischer

The following committee member opposed issuing the report and recommendation:

Ed Gilbert

Chair Sapphire announced the motion passed by a vote of six to one. He expressed appreciation to committee and staff for their patience and hard work in bringing this issue to a close.

Mr. Hollon described the procedure for advancing the report and recommendation to the Commission. He said the report and recommendation will go to the Coordinating Committee at its next meeting, and could be considered by the full Commission on the same day, if it is approved by the Coordinating Committee prior to the full Commission meeting. He said, if that occurs in April, it might be possible for the report and recommendation to be voted on by the Commission in May.

Next Steps:

Chair Sapphire then called the committee's attention to Article V, Section 1, concerning the qualifications of an elector. He said he anticipates that the provision will be subject to in-depth discussion at the next meeting. He identified the section as an important provision that has been subject to a fair amount of litigation. He noted many people feel strongly about the subject, citing as an example a "Voter's Bill of Rights" introduced at a prior meeting in a presentation by Representative Alicia Reece. He said Rep. Reece will be working with staff to identify people and organizations that are interested in addressing the committee on issues related to Article V, Section 1. Chair Sapphire encouraged members of the committee to also let him know of organizations or individuals having an interest.

Judge Fischer said he had a comment about the agenda in general. He said he has been urging the committee to focus on electronic privacy and would like to insert it into the agenda. He said it is important to balance the interests of law enforcement and of individual privacy, and that this is an issue that would be important to the constitutional modernization effort. He urged the committee to take up that issue next.

Chair Sapphire noted the committee's initial plan for the order in which it would consider its assigned sections. Chair Sapphire observed that the issue of privacy was included in the plan but was slated to be considered last. He said the question of privacy in general, and electronic privacy in particular, is a large subject, and is likely to consume a significant part of the committee's time.

Mr. Jacobson said he thinks the committee should focus on electronic privacy first, acknowledging that the voting issues raised by Article V, Section 1 are likely to be controversial and may not be able to be resolved in the amount of time remaining for the committee's work. He said, on the topic of electronic privacy, the committee might be able to make an impact.

Chair Sapphire said the committee has authority to set its own agenda. He said the committee appears to have a consensus that it could address Article V, Section 1 and the question of electronic privacy on a dual track. He said he will work with staff to develop material for background.

Mr. Gilbert said the issue of electronic privacy will take a lot of time, and is very important. He said he hopes the committee will set aside adequate time to deal with that issue.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:46 a.m.

Approval:

These minutes of the March 10, 2016 meeting of the Bill of Rights and Voting Committee were approved at the May 12, 2016 meeting of the committee.

/s/ Richard Saphire

Richard B. Saphire, Chair

/s/ Jeff Jacobson

Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

**MINUTES OF THE
BILL OF RIGHTS AND VOTING COMMITTEE**

**FOR THE MEETING HELD
THURSDAY, MAY 12, 2016**

Call to Order:

Chair Richard Saphire called the meeting to order at 9:37 a.m.

Members Present:

A quorum was present with Chair Richard Saphire, Vice-chair Jeff Jacobson, and committee members Amstutz, Bell, Clyde, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the March 10, 2016 meeting of the committee were approved.

Presentations:

Carrie L. Davis
Executive Director
League of Women Voters of Ohio

Chair Saphire commented that the committee would be taking up two new topics, Article V, Section 1 (Qualifications of an Elector), and privacy, specifically whether the Ohio Constitution should include a provision relating to a right to privacy.

In connection with the committee's review of Article V, Section 1, Chair Saphire described that the provision contains several specific requirements for voting in Ohio, including that a qualified elector is a United States citizen who is age 18 or older, a resident of Ohio for certain time, registered to vote for 30 days, and must have voted in at least one election in the previous four-

year period or is no longer considered registered to vote.¹ He noted the last part of the provision, the requirement of voting within a four-year period, is the subject of litigation in the U.S. District Court for the Southern District of Ohio, Eastern Division, and that he is serving as co-counsel for plaintiffs in that case, a fact he felt necessary to disclose to the committee. He said Article V, Section 1 covers several controversial issues that have been the subject of litigation in Ohio and around the country.

Chair Sapphire then introduced Carrie L. Davis, executive director of the League of Women Voters of Ohio (LWVO), who spoke to the committee regarding her organization's recommendations for changes to Article V, Section 1.

Ms. Davis began by noting that the national history of the League of Women Voters derives from the women's suffrage movement, but now has broadened its mission to engaging all eligible voters in the democratic process. She said the group's policy positions include promoting representative government, citizens' voting rights, and uniform election procedures throughout the country.

She commented that, at the state level, LWVO has adopted a policy position that supports the Ohio Constitution as a "clearly stated body of fundamental principles" that provides for the "flexible operation of government and [is] logically organized and internally consistent." She emphasized that her organization's recommendation for laws relating to voting is that voting be "free, fair, and accessible."

Ms. Davis first recommended that any revision to Article V, Section 1 include an acknowledgement that voting is a fundamental right of all citizens, and indicating that anyone meeting the qualifications of an elector has a fundamental right to vote.

She further described recent litigation involving the question of whether 17 year-olds who will be age 18 by the general election may vote to nominate candidates to appear on the general election ballot. She said the committee may wish to consider whether to incorporate language in Article V, Section 1 on that topic, such as "of the age of eighteen years on or before the general election."

Ms. Davis also noted the provision's residency requirements, suggesting alternative language that would define a qualified voter as someone "who is currently a resident of the state, county, township, or ward."

She said LWVO also recommends eliminating the phrase "and has been registered to vote for thirty days," replacing it with "and is registered to vote as may be provided by law." She commented that this change would retain the general principle that an elector must be lawfully registered in order to vote, but would provide greater flexibility for the legislature to modernize

¹ Article V, Section 1 provides: "Every citizen of the United States, of the age of eighteen years, who has been a resident of the state, county, township, or ward, such time as may be provided by law, and has been registered to vote for thirty days, has the qualifications of an elector, and is entitled to vote at all elections. Any elector who fails to vote in at least one election during any period of four consecutive years shall cease to be an elector unless he again registers to vote."

the voter registration process. She said such a change would allow statutory change that would accommodate voting for persons who move to Ohio within 30 days of an election.

Ms. Davis said her organization also supports voting reforms such as same-day registration and automatic voter registration, noting that while Ohio lawmakers currently do not favor these concepts, the positive experiences of other states that have adopted these measures may make them more appealing in the future. She said the newest trend is automatic voter registration, with four states now using it for citizens who meet specific criteria. She said in those states, the registration is tied to bureau of motor vehicle records, and that other states are watching to see if that procedure has a positive impact on voter turnout.

Thus, she said, refining the language in the constitution to allow “current registration as may be provided by law” allows flexibility for the legislature to modernize the state process as new technology and best practices become viable.

Describing the National Voter Registration Act (NVRA or “motor voter”) that was signed into law in 1993, Ms. Davis said Article V, Section 1’s requirement that voters who do not vote at least once in a four-year period are removed from the rolls is a practice that does not correspond to the procedures set forth in the NVRA. She said LWVO “strongly recommends” that the provision be amended to reflect current federal law, noting that “the legislative history of the NVRA and the text of the act and related regulations make clear that voters should only be removed from the rolls based on eligibility (i.e., they cease to be eligible) and that proper safeguards must be in place to ensure no one is removed in error.”

Finally, Ms. Davis said the LWVO supports adding language that would make voter registration permanent and portable within the state. She said the preferred procedure allows registered voters who move within the state to remain registered, with the move requiring only a simple update to their records. She said the General Assembly has recently adopted statutory changes that make it easier for registered voters to file a change of address, and to do so online. She said incorporating this concept in the constitution would ensure that registration reforms would not be eliminated by future lawmakers or secretaries of state.

Ms. Davis having concluded her remarks, Chair Sapphire asked whether she is aware of any state that uses a birth certificate as the basis for automatically registering a voter. Ms. Davis answered negatively but said that is one option that could be used. She said one concern with automatic registration and online registration is that a lot of early adopters have relied on bureau of motor vehicle records but not everyone has a driver’s license or state identification card. She said there has to be a safety net provision, and that a birth certificate may be one option but there may be other governmental records that would qualify.

Mr. Jacobson asked about voters who move to Ohio within 30 days of an election, specifically wondering if the LWVO supports the removal from voting rolls of Ohio residents who move to other states and register there. Ms. Davis answered that state and federal law already provides for that situation. She said there should be adequate safeguards, so that voters who register in the new state must give notice they want to cancel their registration in their prior state so that cancellations do not happen in error. She said the idea is that, 90 percent of the time, voters will

register to vote in the new state and not use the registration in the old state. But, she observed, it is important to be sure “snowbirds” are not disenfranchised. Voters who spend part of the year in another state need to decide where their permanent residence is. She said the NVRA has procedures for these situations.

Chair Sapphire said if a voter moves and files a change of address form with the post office, the secretary of state gets notice, but that information does not indicate that the person has registered in the new state. He said it would be important that the change of address notice not be used to automatically cancel the voter’s registration in the old state.

Ms. Davis said the NVRA, as well as Ohio law, spells out that when someone moves, the prior state of residence gets a notification. She said, currently, the Ohio secretary of state, or board of elections, is supposed to send a postcard verifying whether the person wants to cancel Ohio registration.

Commission member Karla Bell asked whether the notice of a change of address triggers removal from the rolls. Ms. Davis said that does not occur immediately, rather, once election officials receive notice that a voter has moved, they are supposed to contact the voter to see if the voter wants to maintain that registration. She said she is not sure, but she thinks the notice may be sent to the voter’s registered address, with it being forwarded by the post office to the new address.

Chair Sapphire noted the system in Ohio is an amalgam of constitutional provisions, statutes, and secretary of state directives, asking whether LWVO advocates or Ms. Davis is aware of a model state constitutional provision that would cover these issues. Alternately, he asked whether there is another state that handles these issues better than Ohio.

Ms. Davis said she does not have a model now but she would be interested to research the question. Chair Sapphire requested that Ms. Davis submit, in writing, her advice as to what statutory framework would be better than Ohio’s current law, and Ms. Davis agreed to do so.

Committee member Ed Gilbert asked how removing the 30-day registration requirement from the section and allowing the General Assembly to enact related law would solve the problem. He also asked whether Ms. Davis would advocate a broader list of documents that would provide proof of identity and residence.

Ms. Davis said the goal is to remove the 30-day requirement, allowing more flexibility in the statutory law to provide for same-day or automatic registration. She said, right now, 30 days is the maximum time allowed under federal law, and that Ohio is the outlier because other states have a shorter time period. She said, originally, the rationale for having the early deadline was the time that it took to process and verify, and before computers that made sense. But now, she said, because it is easier to process information online and same-day and automatic registration are becoming common.

Regarding sources of voter identification, Ms. Davis said the model is the Help America Vote Act (HAVA), which describes a list of documents that may be used. She said Ohio’s voter

identification law, enacted in 2005, almost exactly mirrors the HAVA language, allowing use of a driver's license, state identification card, military identification card, other government document, the last four digits of the social security number, utility bills, pay stubs, and bank statements.

Representative Kathleen Clyde commented that, as a legislator, she has been frustrated by a focus on voter fraud problems such as double voting and voter impersonation when the evidence of these problems is lacking. She noted the fear of voter fraud has brought about legislation that has made voting harder, such as shortened early voting or requirements for voters to complete more steps. She asked Ms. Davis what she sees as the biggest problem in Ohio elections, wondering what lawmakers should be focusing on to make voting easier.

Ms. Davis said the fundamental hurdle is perception. She said some people view voting as an absolutely fundamental right, while others view it as a privilege or responsibility. The question becomes where the onus is placed: is it on the government to provide a free, fair, and accessible process that empowers everyone who is eligible, or is it on the voter who should have to take steps to overcome obstacles?

Ms. Bell asked whether Ms. Davis is aware of any actual instance of voter fraud in the last ten years. Ms. Davis said voter fraud is often mentioned but is extremely rare. She said it is also important to note that there is a process to prevent it, and to punish it if it happens. She said the most common problems are not in casting ballots but in the registration process. She said there is a difference between voter registration fraud and in-person election fraud, observing there are requirements along the way and many opportunities to verify information that minimize the risk of fraud.

Mr. Jacobson commented that Ms. Davis is advocating that those protections be eliminated. Ms. Davis said there are rare occurrences of fraud, with the most common fraud occurring when someone helps another complete an absentee ballot, but that doing so is a statutory offense. She said the secretary of state has widely publicized its investigations into election irregularities, but only a tiny percentage lead to legal action. She said the number "is not an absolute zero but it is very small." She noted a handful of states offer Election Day registration, and they do not have higher risk or incidence of fraud.

Rep. Clyde said she is concerned about the startlingly low voter turnout, noting that less than 40 percent of the voting age population participates in elections. She asked what can be done to increase voter turnout. Ms. Davis agreed that voter turnout is a problem, but said constantly changing election laws and adding more red tape discourages voters. Instead, she said it would be important to consider inviting people to participate in the process, and that changes that make it harder to cast a provisional ballot, require more forms, eliminate "Golden Week," and adopt the longest registration deadline in the country do not make it easy for voters. She said "voters cue into these changes that say we don't want you to participate."

Representative Alicia Reece
House District 33

Chair Sapphire introduced Representative Alicia Reece, noting that she appeared before the committee in November 2013 to advocate for a voter's bill of rights, and would be giving an update on that effort in connection with the committee's consideration of Article V, Section 1.

Rep. Reece noted that, in 2000, there was a bipartisan effort that resulted in laws to improve voter access and election procedures, but that, since that time, this progress has been eroded. She said that, since 2013, she has seen some of the problems caused by voter suppression bills. For example, in her district, voters had to sue to get their votes counted. She said, during the last general election, in Hamilton County there were problems with electronic poll books, with several locations being subjected to problems that required an injunction to be filed to keep the polls open so that everyone could vote. She said there is now pending a bill that will require the posting of a bond to keep the polls open. She said she has seen thousands of votes go uncounted. She noted a recent absentee ballot postmark issue that resulted in votes not being counted.

She said she is again bringing a voter's bill of rights to the committee's attention, describing that the document is a list of rights prepared by two election law attorneys, Paul DeMarco and Don McTigue. She said the bill of rights memorializes concepts that were agreed to after the 2000 election, but those reforms did not last because they were not put in the constitution. She emphasized the view that voters should have a chance to vote on voting rights, and that "if they are intelligent enough to vote on elected officials, they are intelligent enough to vote on voting rights."

Rep. Reece described voting as a fundamental right, and said placing a voter's bill of rights in the constitution ensures the General Assembly cannot reduce opportunities to vote. She said a constitutional initiative effort is underway, with the proposed language having been approved by the attorney general and the ballot board as a single issue. She said the effort has been slowed by the organizers' lack of funds, but that members of many organizations have volunteered their time to help get petition signatures.

She said the voter's bill of rights provides flexibility to the General Assembly to update voting procedures, while at the same time creating a binding document of protection, and voters should have an opportunity to vote on it. She noted that the bill of rights also would protect against election lawsuits that cost the state and citizens many thousands of dollars.

Chair Sapphire asked about Rep. Reece's statement that the content of the voter's bill of rights derived from prior enacted law. Rep. Reece said those laws had been part of a bipartisan legislation package, and that these are not new ideas. She said at least 90 percent of the voter's bill of rights was previously enacted law.

Mr. Jacobson disagreed, stating one provision in her proposal would allow felons in prison to vote, which has never been part of Ohio law. Rep. Reece answered that her proposal allows voting for felons who have done their time, but nothing allows felons to vote from jail. Mr.

Jacobson continued that the proposal is so broad that it would trump any state law that would say otherwise.

Ms. Bell asked about the pending legislation that would impose a bond requirement for someone seeking an injunction to keep the polls open. Rep. Reece said that bill, if enacted, would require the posting of a \$58,000 bond by a person who seeks an injunction to keep the polls open.

Senator Bob Peterson, speaking as a member of the Senate, clarified that the bond requirement bill just passed the Senate, and said, under the bill, board of elections actions to keep polls open would still be allowed. He described that, in the last primary election, despite there being nothing filed with the court, a federal judge ordered the board of elections to extend hours in two counties. He said, in that instance, in one Congressional district some counties extended voting hours and some did not. He said, under the bill, each board of elections has to certify what a cost per hour is for keeping the polls open, and that the purpose of the bill is to prevent frivolous law suits. He said the proponent of the bill, Senator Bill Seitz, listed five circumstances in which this law would have made a difference, and in none of those examples was the lawsuit filed by individuals, but by a political party. Sen. Peterson also noted that, under the bill, a judge has the authority to waive the bond requirement if there is a reason to believe that the expense is too much. Thus, he asserted, the interests of the indigent have been met.

Mr. Gilbert asked Rep. Reece about the status of the initiative effort. Rep. Reece said they are continuing to work on bringing organizations together on this topic. She said her group cannot wait to pursue a ballot issue because too many events are occurring, with no protection in the constitution, with many lawsuits, and continued efforts by the General Assembly to enact laws that impede voting.

Chair Sapphire thanked Rep. Reece for her testimony, asking for further comment from the committee. There being none, he proposed at the next meeting the committee would be taking up the privacy issue in addition to continuing its consideration of Article V, Section 1.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:02 a.m.

Approval:

These minutes of the May 12, 2016 meeting of the Bill of Rights and Voting Committee were approved at the July 14, 2016 meeting of the committee.

/s/ Richard B. Sapphire
Richard B. Sapphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, JULY 14, 2016

Call to Order:

Chair Richard Saphire called the meeting to order at 9:44 a.m.

Members Present:

A quorum was present with Chair Richard Saphire, Vice-chair Jeff Jacobson, and committee members Amstutz, Clyde, Cole, and Fischer in attendance.

Approval of Minutes:

The minutes of the May 12, 2016 meeting of the committee were approved.

Discussion:

Article V, Section 1
"Qualifications of an Elector"

Chair Saphire announced the committee would be beginning its review of Article V, Section 1, which sets the requirements for a person to be an elector in Ohio, including age, registration, and residency. He noted that, in the 1970s, the last clause of the provision, requiring a voter to vote at least once within a four-year period in order to keep registration current, was added.

Mr. Jacobson asked exactly when that requirement was added. Executive Director Steven C. Hollon indicated the date was 1977. Senior Policy Advisor, Steven H. Steinglass confirmed that there was a commission proposal submitted to voters in the late 1970s, with an initiated effort to impose the 30-day registration period also occurring at that time. He said there was an "instant voter referendum," consisting of a proposal to bar instant voting from the constitution.

Peg Rosenfield, elections specialist with the League of Women Voters of Ohio (LWVO), speaking from the audience, said that Senate Bill 125 in the 112th General Assembly was an omnibus bill that, in part, provided for Election Day registration. She said the Republican Party, particularly Secretary of State Ted Brown, was against same-day registration, and supported an initiative petition to amend the constitution to amend Article V, Section 1 to require 30-day registration. She said same-day registration occurred for one election, in November 1977, and that was the same election that had on the ballot the initiated constitutional amendment that required a voter to have been registered for 30 days. Ms. Rosenfield said that many people registered the day of the November 1977 election and then, that same day, voted to rescind same-day registration. She said the way the ballot measure was worded, some voters were confused and said they voted the opposite of what they had intended.¹ Ms. Rosenfield noted that the four-year voting requirement may conflict with the National Voter Registration Act (NVRA). She said the previous voting frequency requirement had been two years, and that the four-year requirement was meant to allow voters who only wished to vote in presidential years to do so without having to re-register.

Mr. Jacobson said he would like more research on these questions. He said he favors having a voter identification requirement in the constitution. He added that in 2005 the General Assembly approved absentee voting despite objections by many legislators. He said his concern with absentee voting is that not everyone votes at the same time, raising the cost of elections and campaigns because campaign spending has to be extended for the entire period of time during which there is absentee voting. He said this puts a premium on being the incumbent, and has made it more crucial to get big donors. He said he does not believe it is in the best interest of those who vote early because they do not have the benefit of information about the candidates that is provided right up until Election Day. He said this topic may be difficult, but suggested there may be a better way to accommodate voters who cannot vote on Election Day.

Chair Sapphire noted he provided a memorandum to the committee outlining potential issues.

Representative Kathleen Clyde said she would like additional information regarding the source of the “purging” language, requiring voters to vote within a four-year period or be stricken from the rolls. She said she thinks that requirement is in direct conflict with the NVRA. Chair Sapphire noted the history of that provision has been described in the litigation briefs in the case that has now been appealed to the Sixth Circuit, offering to circulate the briefs.²

Rep. Clyde said the most problematic part of this language, besides the four-year voting requirement, is the 30-day voter registration requirement. She said there may be some space to make adjustments under the current constitution, but she would like more information on that from LWVO. She said the 30-day deadline is a single item under Ohio law that impacts voter

¹ The ballot language read: Proposed Constitutional Amendment to Amend Section 1 of Article V of the Constitution of Ohio. To provide that a person is entitled to vote at all elections if he has been registered to vote for 30 days and has the other qualifications of an elector and to provide that a person who is registered and fails to vote in at least one election during any period of four consecutive years must register again before being entitled to vote.” Source: [https://ballotpedia.org/Ohio_30-Day_Voter_Eligibility_Amendment_1_\(1977\)](https://ballotpedia.org/Ohio_30-Day_Voter_Eligibility_Amendment_1_(1977)) (last visited July 15, 2016).

² *Ohio A. Philip Randolph Inst. v. Husted*, Case No. 16-3746 (6th Cir. 2016), on appeal from *Ohio A. Phillip Randolph Inst. v. Husted*, Case No. 2:16-cv-303, 2016 U.S. Dist. LEXIS 84519 (S.D. Ohio June 29, 2016).

turnout and is the longest deadline allowed under federal law. She said the provision requires voters to complete something well in advance of an election. Similar to Mr. Jacobson's points about 30 days of voting, Rep. Clyde said the 30-day registration requirement also has the problem of people thinking about what they want to do but are not energized because the major focus of campaigns is right before Election Day. She said those would-be voters are excluded because they did not do the paper work 30 days in advance. She said there is no evidence that states that have same-day registration have problems. She said "We can look to those states for best practices; states that have same-day registration have ten percent higher voter turnout than we have here in Ohio. That is the problem we should be considering, why do we lag other states in the number of people who are turning out to vote in our elections." She suggested that the 30-day requirement is onerous and she would be open to discussions about changing that language. Alternately, she said she favors doing something like same-day registration, or opening up the possibility for automatic registration. She said the election process would benefit from new constitutional language that would allow the General Assembly to provide statutory law on these options.

Mr. Steinglass, answering Mr. Jacobson's question about the history of the four-year voting requirement, said the language on purging and the 30-day registration requirement were both proposed by initiative and approved in November 1977. He said, prior to that time, there was no explicit provision in Article V, Section 1 on either registration or on purging. He said there may have been statutory requirements on either. He suggested it would be helpful to look at the secretary of state's website for data comparing voter turnout with eligibility and registration requirements.

Mr. Jacobson asked about the registration requirements in other states. Rep. Clyde said about ten states have 30-day registration requirements.

Chair Sapphire described that the absentee voting provision arose in 2005 in reaction to events occurring in the 2004 presidential election, when the voting system broke down. He said there are some provisions of the Help America Vote Act (HAVA) that affect provisional and absentee voting. He said it would be useful to consider whether the HAVA provisions affect the committee's ability to change Article V, Section 1. He continued that further research regarding the four-year voter purge requirements in Article V, Section 1 would be useful, noting that issue is subject to litigation in the *Randolph* case, noted above, in which he is co-counsel for plaintiff, as well as litigation in a Georgia federal district court. He said it has not been authoritatively resolved as to whether NVRA or other federal provision prohibits voter purging.

Mr. Jacobson referenced his interest in constitutionalizing a voter identification provision. Chair Sapphire said such provisions, where they exist, are being challenged around the country. Mr. Jacobson noted that at least one such requirement, in Indiana law, has been approved by the United States Supreme Court.³

Chair Sapphire requested that the committee receive more historical background on how the registration clause was placed in Article V, Section 1, and that it would be useful to know more about the residency requirement of Article V, Section 1.

³ *Crawford v. Marion Cty. Election Bd.*, 553 US. 181 (2008).

Chair Sapphire continued that the committee may wish to address whether the constitution should include reference to allowing 17-year-olds to vote in the primary if they will be 18 by the time of the general election.

Judge Patrick Fischer said he would like research regarding voter turnout percentages, asking if the secretary of state's office might have information about whether changes in the law have increased voter turnout. He said turnout percentages for presidential elections have stayed the same since the 30-day provision. If the committee is to propose changes, he said he would like to know those changes would increase voter turnout. He requested research on this from Ohio or from other states.

Mr. Jacobson suggested there are very few nonpartisan election experts in election law. Chair Sapphire noted the committee is fortunate to have professors at the Ohio State University who specialize in election law, but Mr. Jacobson said they are advisors to only one side of the issues. Chair Sapphire said he knows there is a lot of research on Judge Fischer's question.

With regard to the question regarding absentee voting, Mr. Jacobson said he concedes that it is good for democracy for people to participate, but that early absentee voters may be making choices that they might not make if they had up to Election Day to decide.

Judge Fischer asked whether the committee would be considering making Article V, Section 1 gender neutral, pointing out that the last part of the provision uses the pronoun "he."

Chair Sapphire asked Mr. Steinglass whether there was a group within the Commission that was considering the question of gender neutralizing the entire constitution. Mr. Steinglass said there is a working group that logically would include that task, but that group has not really convened. He said he has provided draft research and there is a placeholder for addressing that issue. Asked whether other committees have included a gender neutral discussion, Mr. Hollon said other committees have only considered gender neutral language where other changes were being contemplated, and have not considered it as a stand-alone topic.

Mr. Steinglass noted, "we clearly have a 19th century constitution; there are many references that are outdated, and one could do a grammatical update, but that has not been a high priority." He observed that other states have done that in different ways than simply presenting it to the electorate. For instance, he said, there can be a delegation to a group to come up with an amendment, and one state allowed the state supreme court to handle it. He said the Constitutional Revision and Updating Committee presumably will be looking at other ways to address those issues.

Chair Sapphire said, if the committee were to decide to retain the existing provision, it would not recommend gender neutralizing the language. Mr. Hollon said he has had conversations with the Coordinating Committee on this question, and his conclusion was that asking each individual committee to perform the gender neutralizing function does not necessarily make sense. He said, for consistency, it would be important to have one committee working on this, and he thinks it should be the Coordinating Committee, upon the suggestion of the subject matter committee.

Judge Fischer then withdrew his suggestion.

Chair Saphire said the committee had requested extensive research and would be in a better position at its next meeting in October to further discuss these questions.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:39 a.m.

Approval:

These minutes of the July 14, 2016 meeting of the Bill of Rights and Voting Committee were approved at the December 15, 2016 meeting of the committee.

/s/ Richard B. Saphire
Richard B. Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, DECEMBER 15, 2016

Call to Order:

Chair Richard Saphire called the meeting to order at 9:41 a.m.

Members Present:

A quorum was present with Chair Richard Saphire, Vice-chair Jeff Jacobson, and committee members Bell, Cole, Fischer, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the July 14, 2016 meeting of the committee were approved.

Discussion:

Article V, Section 1
“Qualifications of an Elector”

Chair Saphire announced the committee would be continuing its review of Article V, Section 1, which sets the requirements for a person to be an elector in Ohio, including age, registration, and residency. He recalled that at a previous meeting the committee had heard presentations from Representative Alicia Reece and from Carrie L. Davis, executive director of the League of Women Voters of Ohio (LWVO), who proposed revisions to the section.

Chair Saphire said among the suggestions was a change that would refer to voting as a fundamental right. He said he is not sure if other state constitutions have that wording, but it might be important to state that because courts and the public generally have considered that to be the case. He said some have suggested removing the section’s explicit requirement that a person be registered for 30 days before being permitted to vote. He said Ohio’s requirement is among the longest periods required by any state and may be the longest permitted by federal law.

He said removing that language from the constitution would give the General Assembly the ability to shorten that period. Chair Sapphire continued that the section contains the requirement that a voter be at least 18 years of age, but that by statute one may register at age 17 and vote in the primary if he or she will be 18 by the time of the general election. He wondered if this statutory law should be explicitly set out in the constitution. He noted a court decision that upheld allowing 17 year-olds to vote in the presidential primary, a decision the secretary of state opted not to appeal.¹ Chair Sapphire said the committee may want to change the wording regarding the residence of the voter, indicating that it might be better to indicate a voter is qualified if he or she is a current resident of the state as opposed to the references to local political subdivisions in the current language. Chair Sapphire said among the ideas proposed was to eliminate the last sentence of the section, which requires the secretary of state to purge from the voting rolls anyone who does not vote in a four-year period. He said this provision, known as the “vote purge” requirement, has been held by the United States Court of Appeals for the Sixth Circuit as being against the National Voter Registration Act (NVRA). He said the current secretary of state does not enforce that last provision. Chair Sapphire added that Vice-chair Jeff Jacobson has proposed adding a voter identification requirement to the section.

Chair Sapphire then asked committee members for their views on potential changes to the section.

Mr. Jacobson noted voting statistics from the secretary of state relating to the ratio of registered voters to voter turnout. He said one thing that stands out is that the 1992 turnout level was 77 percent, but after the passage of the NVRA in 1993, the turnout percentage declined as the voting rolls grew. He said, since that time, the number of registered voters peaked in 2008, yet the percentage of those actually voting has not gone up. He said “If we date all modern improvements to the 2005 decision to allow absentee ballots and take away from one national voting day, the interesting thing is that our participation and number of votes has not materially increased, despite the flurry of law suits.” He said increasing registration has not affected participation. He asserted that, despite claims that actions by the General Assembly and Republicans have worked to suppress voter participation, in the most recent election there was still 71 percent participation, with a drop off of only 26,000 when the voter rolls dropped by much more than that. He said as much as he would like to see a repeal of the no-fault absentee ballot and a move back to having one voting date, he does not think it would be fruitful to pursue any of the proposals that have been presented to the committee. He said he will move that the committee tables the review of Article V, Section 1, and that it move on to more fruitful activities.

Chair Sapphire asked Mr. Jacobson for a formal motion. Mr. Jacobson moved to postpone indefinitely the review of Article V, Section 1. He said he was making this motion, rather than a motion to retain the section as is, because a motion to retain would result in “a much more partisan conversation.”

Committee member Karla Bell said she is interested in the statistics. She said she does not know the differential impact of the purge requirement on minority groups, and would like to see a breakdown based on political party.

¹ *State ex rel. Schwerdtfeger v. Husted*, Franklin County Common Pleas No. 16CV-2346 (March 11, 2016).

Mr. Jacobson said it would be possible to find out if someone has not voted for four years, but he is not sure if it is possible to find out if registered voters who have abstained from voting are Democrats or Republicans.

Ms. Bell said she assumes someone has evaluated that differential impact since the federal courts have relied on the differential impact as the basis for invalidation. She said she lacks information and she would like to have that researched and have that information available before the committee makes a decision.

Chair Saphire said, concerning litigation regarding the challenge to the state's vote purging policy, the court did not rely on differential impact, although the plaintiffs asserted it in the complaint. He said that issue was not pursued during the course of litigation. But, he said, there is data suggesting the number of people under the previous policy who were disenfranchised by the purge, adding there also is data regarding whether the impact is discriminatory.

Ms. Bell asked Chair Saphire to provide that information and he agreed to do so.

Senator Bob Peterson commented that, while the committee could have an interesting discussion on the topic, for the sake of efficiency it would be better not to have the discussion in great detail at this meeting.

Ms. Bell asked about the present status of voting as a fundamental right under Ohio state law and under federal law. Chair Saphire said federal law as well as the United States Supreme Court and lower federal courts, since the 1960s, have held the right is fundamental, and therefore state and local regulations that significantly burden voters get strict judicial scrutiny. He said reapportionment issues end up in the Ohio Supreme Court, but voting rights not so much. He said the Ohio Supreme Court has interpreted the state constitution as a mirror image of the federal constitution, and that is also the case with regard to voting rights.

Ms. Bell asked about the date of the expansion of the use of the absentee ballot. Mr. Jacobson said this occurred in July or August of 2005. Ms. Bell asked if there is any idea what percentage of the votes is absentee. Chair Saphire said at the last election the number was over 30 percent.

Mr. Jacobson said he does not disapprove of absentee voting, but thinks there should be good reason for a voter to use it.

Chair Saphire said he thinks the evidence regarding the effect of these measures is contested. He said same-day registration, where it is permitted, has a boosting, positive effect. But, he said, it is also the case that there is mixed evidence about the effect of early voting. He said his limited research indicates the statistics are equivocal about whether early voting brings people to the polls.

Committee member Doug Cole said early voting is a matter of statute rather than constitutional. He said, right now, if someone votes early and then comes to the polls to vote on Election Day, the early vote is the one that is counted. He said one wonders if it should be the converse. Mr. Jacobson said some states do it that way.

Ms. Bell noted that if those voters come to the polls on Election Day they will get a provisional ballot. Mr. Cole said if both ballots are returned, however, only the absentee ballot is counted. He added this requirement is by statute.

Mr. Cole noted that the committee has a quorum and could vote on Mr. Jacobson's motion. Mr. Jacobson renewed his motion to "postpone further consideration of this section." Sen. Peterson seconded the motion.

Chair Sapphire asked for clarification of a point of order, wondering whether, if the motion passed, the committee would be able to reconsider the motion or reopen discussion of the section at a later date. Ms. Bell said it would be unfair to take the review off the table with so many members of the committee absent.

Chair Sapphire asked how the matter might be brought back before the committee. Mr. Jacobson said a motion to postpone indefinitely is a final disposition. He said there could be a motion to reconsider, but that must be made by someone who voted with the majority.

Steven C. Hollon, executive director, said he thinks that is correct. He asked whether a decision to postpone indefinitely would prohibit the committee from issuing a report and recommendation saying that it could not reach a consensus regarding the section. He said a report and recommendation would allow the committee to report its proceedings on the matter to the full Commission.

Chair Sapphire said that goes to his concern. He said he would oppose a motion but suspects if it were necessary to bring a motion back before the committee he would vote with the majority in order to be able to do so. He said he would like to see the committee be able to dispose of the issue in some final way, regardless. He said one concern is that if the committee passes this motion and the matter is not brought before the committee for further discussion, it will lie there in limbo, unavailable for final disposition in the form of a recommendation.

Mr. Jacobson said the committee could spend the next year on this topic, but it is not something that can be solved because it is too partisan. Commenting on the presentations the committee heard, he said "We saw a litany of anything people could think of that would liberalize the voting process. We don't see that the rules have contributed the inability of people to participate in our democracy. There has been remarkable little commentary afterward to suggest that Ohio had anything other than a complete fair election and yet the committee will tear itself apart." He reminded the committee of the difficulty experienced in considering Article V, Section 6, relating to mental capacity to vote. He said the best thing to do would be to postpone the conversation.

Ms. Bell said she does not disagree with postponement, but completely removing it from the committee's agenda makes her wary. She said she would vote to postpone the topic until the committee concludes its work on other matters.

Mr. Jacobson agreed and said he would withdraw the motion and go with Ms. Bell's suggestion.

Chair Sapphire asked what the committee would address as its next topic. He said he disagrees with Mr. Jacobson's characterization of this process as partisan. He said there are examples of people being able to act in a nonpartisan way. He said he would hope the committee would decide to retain the provision that exists now if it cannot agree to change it. He said his strongest concern is that the vote purge provision violates federal law and that it is problematic to disenfranchise people who are occasional voters.

Mr. Jacobson withdrew his original motion and offered a new motion to postpone further consideration of Article V, Section 1 until the committee has completed its work on the remaining topics under its purview. Sen. Peterson seconded the motion.

Mr. Cole asked whether it would be better to give a date certain.

Mr. Jacobson then amended his motion to state that the committee would postpone further consideration of Article V, Section 1 to July 1, 2017, noting this would give the opportunity to consider studies that would be available regarding the most-recent election.

A roll call vote was taken, with five in favor, one absent for the vote, and one abstaining.

Chair Sapphire asked the committee about the next topic for consideration. Mr. Hollon directed the committee to its worksheet.

Chair Sapphire said he would like to revisit Article V, Section 7, relating to primary elections. He said the committee had reached consensus on one or two parts of the section but did not finish its review. He said a staff memorandum could be distributed at the next meeting. Chair Sapphire then provided a brief summary of the questions the committee had raised about the section.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:32 a.m.

Approval:

The minutes of the December 15, 2016 meeting of the Bill of Rights and Voting Committee were approved at the February 9, 2017 meeting of the committee.

/s/ Richard B. Sapphire
Richard B. Sapphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, FEBRUARY 9, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 10:36 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Bell, Clyde, Cole, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the December 15, 2016 meeting of the committee were approved.

Presentations and Discussion:

Chair Saphire began the meeting by indicating that Article V, Section 2, regarding elections by ballot, Section 2a, relating to names on the ballot, and Section 7, relating to primary elections, briefly had been considered by the committee in June and July of 2014. He said the committee voted to recommend retaining Sections 2 and 2a in their current form; however, this was prior to the Commission having staff or formal procedures for reporting committee recommendations. He said the committee took no action regarding Section 7.

Chair Saphire said although the committee might be said to have concluded its consideration, after consulting with staff he thought it would be better for the committee to follow current procedures by creating a report and recommendation relating to Sections 2 and 2a. Thus, he said, he would like to have the committee consider Article V, Sections 2, and 2a, as well as Section 7, before publishing its conclusions in a formal report and recommendation.

He said, with this plan in mind, the committee would be hearing presentations from both an elections expert with knowledge of ballot preparation, and a political science professor who has written about the ballot process.

Matthew Damschroder

Deputy Assistant Secretary of State and Director of Elections

Office of the Secretary of State

“The Order of Candidate Names on the Ballot”

Chair Sapphire introduced Matthew Damschroder, assistant secretary of state and chief of staff for Ohio Secretary of State Jon Husted. He indicated that Mr. Damschroder is the former director of the Franklin County Board of Elections.

Mr. Damschroder said in the 1950s and 60s, boards of elections in Ohio had hand-counted paper ballots. He said there were several forms of ballot: a presidential ballot, a party-type ballot, a nonparty ballot, and a question-and-issue ballot. He said the voter would sign in at the polling place and tear off a sheet from a pad for each of the different ballots. Mr. Damschroder said that process continued as counties implemented punch card systems, and other new technology, on into the 1980s and 90s when boards of elections began using optical scan sheets and touch screens.

He continued that, within each of those categories, contests appear in the order of statewide, then district, then county, then any offices within the county, noting that some counties have districts for their county commissions.

Regarding rotation of names, he said within each office contest candidate names are rotated. He said Ohio is the only state that has rotation built into the constitution. Other states require rotation by state law, and in some states all ballots are the same in alphabetical order. He noted that, in Illinois, names are drawn out of a hat to establish ballot order.

Mr. Damschroder said, in Ohio, the procedure is for the first precinct in the county to have a straight alphabetical order, and the next precinct shifts down one, and so on. He said the goal, within a county, is for every candidate in a contest to have the opportunity to have his or her name first. He said there is research indicating a statistical advantage to being first, so the idea behind rotation is to prevent any one candidate from having an advantage. He noted that, now that Ohio has no-fault absentee voting and a larger percentage of ballots being cast early, Secretary of State Husted requires all counties to follow the same layout for absentee ballots that would appear on the ballot if the voter would see at the polls on Election Day. As a result, a precinct’s voters receive the exact same ballot regardless of whether they are voting early, absentee, or in person.

Regarding questions and issues, Mr. Damschroder said there is also a type of rotation that happens on an annual basis, with statewide questions always being the first to appear. However, he said the categories of other issues rotate year to year. For example, he said it is possible that this year if countywide issues are at the top, next year school levies or township issues would be first.

Mr. Damschroder having concluded his remarks, Chair Sapphire asked if the committee had questions.

Vice-chair Jeff Jacobson asked about the length of lines at the polls, wondering if long lines are a recent development. Mr. Damschroder said more attention being given to the usability of the ballot by the voter, noting that the conversation in the academic literature and the profession is how to make the ballot as understandable as possible. He said the issue of long lines for voting is more of a recent issue, and the lines the voters experienced in Ohio in 2004 is something that drew a lot of national attention. He said the situation in Ohio has dramatically improved in terms of how long it takes to vote, either in person early or on Election Day.

Mr. Jacobson asked when Ohio started shrinking the number of precincts. Mr. Damschroder noted a law that passed before the 2004 election that lowered the maximum number of voters in a precinct to 1400. Mr. Jacobson wondered whether the explanation for the long lines could be the lack of voting stations and personnel at a precinct, rather than an issue with the ballot system itself.

Mr. Damschroder answered that, in 2004, voter lines were due to two issues: a lack of voting machines because of a lack of federal funds, and a lengthy ballot with a system that could not handle the workload. He said, since 2004, measures have been taken to make the system more efficient.

Committee member Doug Cole asked whether Mr. Damschroder could offer any changes or has concerns about current provisions in Article V. Mr. Damschroder stated that his main focus was on Section 2a, and that he did not have any issues or concerns regarding that section. He added he would be willing to review other sections to see if there is a need for change.

Committee member Karla Bell asked whether there has been a reduction of the number of polling places in Ohio since 2004. Mr. Damschroder said her question could be answered by considering polling places and individual stations, and by considering precincts where there are a fixed number of people in a precinct. He stated that there are fewer individual polling places than there used to be. One reason, he noted, is that it can be difficult to find appropriate facilities for polling places. For example, he said finding locations that are accessible to those with disabilities can be challenging.

Ms. Bell asked where she could find information about the history of the number of polling places. Mr. Damschroder stated that he was unsure whether that information was archived, but that he does have information about the number of precincts and a current listing of individual polling places.

Committee member Ed Gilbert asked whether poll workers are being trained sufficiently to serve minority voters, specifically relating to what poll workers should and should not say to voters. He asked whether there is any mandatory training at the state level to address these issues. Mr. Damschroder said there are statewide training resources available for poll workers, including a manual and online training offered by the secretary of state. He stated that there is specific training on how to interact with voters, especially voters with disabilities.

Ms. Bell commented that, as a poll observer in the last election, she was distressed by the lack of information poll workers had. She stated that poll workers were unfamiliar with even the state-issued easy guide for poll workers. She stated that it seemed as if no one had walked through the process with the poll workers and that no one seemed to know what the procedures were.

Mr. Damschroder stated that training classes for poll workers are three hours long in Franklin County, with an opportunity for any poll worker to do supplemental training. He stated that the training is led by the board of elections and that he would be sure to pass along the concern about untrained poll workers.

Chair Sapphire asked how rotation of ballots and absentee ballots are handled. Mr. Damschroder answered that Secretary Husted requires all boards of election to use the same ballot rotation for absentee voting, whether in person or by mail.

Chair Sapphire asked if he receives the ballot associated with his address when he votes, and Mr. Damschroder answered in the affirmative.

Chair Sapphire asked whether the secretary of state has considered an all-electronic voting system, using Oregon as an example, and what that would entail. Mr. Damschroder said he is unaware of any states having widespread online voting, except for the states that use it for overseas and military voters. He said he does not see sufficient confidence from voters that would support the state moving in that direction.

Chair Sapphire said one concern might be whether Section 2, which requires voting to be done by ballot, contemplates machine voting, and whether allowing online voting would raise some issues under the constitution.

Senator Bob Peterson commented that, in his home county, which is a rural county where having sufficient funds is a challenge, the board of elections consolidated precincts, put polling places in better facilities, and has experienced increased voter turnout. However, he said, the change created a challenge in that the number of seats on the central committee of both parties decreased from 38 or 39 to 21. He said, although the consolidation of precincts promoted efficiency, it lowered political participation.

Mr. Damschroder said his office has heard from multiple counties about this issue, and there have been conversations with both parties about changing the law to allow additional seats or at-large seats on the central committees.

There being no further questions, Chair Sapphire thanked Mr. Damschroder for his presentation.

Erik J. Engstrom
Professor of Political Science
University of California, Davis
“The Politics of Ballot Choice”

Chair Sapphire introduced Erik J. Engstrom, professor of political science from the University of California, Davis. Chair Sapphire indicated Professor Engstrom specializes in the study of United States political institutions, political parties, and American political history. Chair Sapphire indicated Prof. Engstrom co-authored, with Jason M. Roberts, a recent law review article entitled “The Politics of Ballot Choice,” which was provided to the committee for its review.¹

Prof. Engstrom began by noting Ohio has interesting history related to ballot laws. Providing a brief history of how elections were conducted in the 19th century, he said balloting was not the responsibility of state governments. Rather, he said, the political parties themselves were printing the ballots and distributing them to voters. The parties would print the candidates for their own party on that ballot, and a voter would get a ballot from a party and cast that ballot. He said balloting was quite different, so, in effect, voters were almost forced to vote a straight party ticket by default. He added that voting was not secret – others could observe and monitor voters as they cast their ballots. He said the lack of a secret ballot created the potential for vote buying.

Prof. Engstrom continued that, at the end of the 19th century, states began to reform the way they conducted elections by developing the Australian, or “secret” ballot, with Massachusetts being the first state to adopt the change. He said this new ballot has the format largely used now in the United States. In addition, he said ballots are now printed and distributed by the state, rather than the political parties. He noted an additional feature, which is that the ballot is consolidated so that, instead of just a Republican or Democratic party ballot, it has all the candidates listed, allowing a voter to split his or her vote more easily. He said a final important feature is that now voting is conducted in secret, using a curtain or a voting booth. He said it took about 30 years for all states to adopt some form of the new secret ballot, with Ohio being an early adopter in 1891.

Prof. Engstrom said, despite these changes, the states still varied in the types or formats of ballots they chose to use. He said the ballot format most commonly in use now is the office-bloc format, which lists the candidates office by office. He said this is the format Ohio uses, as a result of a voter referendum in 1949 to switch from the party column to the office-bloc format.

Chair Sapphire asked whether other states constitutionalize ballot order requirements. Prof. Engstrom said most states do it by statute, and Ohio seems to be unique in setting it out in the constitution.

Prof. Engstrom continued that the other format states use is a party column, listing the candidates in columns by party. He said states also can use a single party ticket by making a mark above the column, but states have been moving away from that.

¹ Erik J. Engstrom and Jason M. Roberts, *The Politics of Ballot Choice*, 77 Ohio St. L.J. 839 (2016).

Prof. Engstrom having concluded his remarks, Chair Sapphire asked if committee members had questions.

Referencing the Australian secret ballot, Mr. Cole asked whether this was a way to buy votes and validate that voters were voting a particular way. Prof. Engstrom stated that this was correct and that the idea was to prevent fraud and intimidation at the voting booth.

Mr. Cole asked whether absentee ballots might interfere with the goal of avoiding fraud or whether it could raise the prospect for the type of conduct that caused the adoption of secret ballots. He also asked if there was any research that had been done in this area. Prof. Engstrom said he was not aware of any research, but recognized it to be an interesting question.

Ms. Bell asked whether there was any trend within the 50 states concerning independent candidates having the opportunity to get on the ballot. Prof. Engstrom said some states have thresholds that are quite substantial in terms of filing fees, or gathering a large number of signatures, while other states have fairly minimal thresholds. He said, as a historical side note, one reason that the parties were amenable state-controlled balloting was that it helped them control the influence of minor parties better than the old party balloting system. So, he said, state control meant that the state could control who gets on the ballot and so reduce the influence of minor parties.

Mr. Gilbert asked whether Prof. Engstrom had recommendations for changes to Article V. Prof. Engstrom said he does not have any recommendations, noting ballot format is very political. He said there is litigation going on in Michigan as that state tries to switch from one format to another. He noted he found Article V, Section 2a confusing in its reference to an “elector.” He said at first he thought it referred to the Electoral College, but that it became clear that it means “voter” when it is read in context.

Mr. Gilbert observed that nothing in the constitution says a ballot is secret, wondering if the committee should consider adding the word “secret” to Article V, Section 2. Prof. Engstrom said some states, such as Montana, have a provision that says the ballot must be secret. He said he assumes in Ohio the ballot is secret according to statute, but the requirement could be put in the constitution.

Chair Sapphire said the requirement is well-established by Ohio Supreme Court decisions interpreting Section 2.

There being no further questions, Chair Sapphire thanked Prof. Engstrom for his presentation.

Chair Sapphire then opened the floor for discussion regarding changes or modifications to Article V, Sections 2 and 2a.

Mr. Gilbert suggested the committee discuss whether to add “secret” to the constitution, saying he is shocked the word is not already included in Section 2.

Chair Sapphire suggested that the concept of a secret ballot may be so entrenched that it may not be necessary to add the word “secret.”

Senior Policy Advisor Steven H. Steinglass provided history on the need for a secret ballot, stating that in 1912, Section 2 was held to bar the use of voting machines. He continued that, in the 1920s the Ohio Supreme Court identified the need for secrecy of the ballot, changing that position. He said that is the last and most authoritative statement on secrecy, with there being no challenges since the 1920s.

Mr. Gilbert asked whether online voting would present an issue when suggesting that the vote be kept secret. Mr. Steinglass stated that he was unsure how that would work.

Mr. Gilbert moved that the committee recommend Article V, Section 2 be amended to add the word “secret.” Ms. Bell seconded the motion. The motion passed unanimously.

Chair Sapphire asked if there were any changes being recommended for Section 2a.

Mr. Steinglass gave an historical account of Section 2a, stating that using the Australian ballot exacerbated the problem of roll off. He said in 1903 legislation was adopted allow political parties to endorse a ballot measure, which helped with that problem. Chair Sapphire asked whether straight ticket party voting takes care of roll off. Mr. Steinglass replied that it depends on how one considers ballot issues.

Upon a motion to recommend retaining Section 2a in its current form, the committee voted unanimously in favor of the motion.

There being no recommendation to amend Section 2a, Chair Sapphire indicated two separate reports and recommendations should be prepared: one recommending the addition of the word “secret” to Section 2, and one recommending no change to Section 2a.

Chair Sapphire suggested that Article V, Section 7 be discussed at the committee’s next meeting in March. Referring committee members to a staff memo regarding Section 7, Chair Sapphire said one issue was brought before the committee in reference to getting rid of the preferential United States Senate ballot because the Seventeenth Amendment rendered the provision superfluous.

Ms. Bell asked about the prior actions by the committee regarding Section 7. Chair Sapphire stated that there were no specific proposals, other than the notion that the committee had approved getting rid of the preferential treatment of senators. He said the committee would continue its review of Section 7 in March.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 12:03 p.m.

Approval:

The minutes of the February 9, 2017 meeting of the Bill of Rights and Voting Committee were approved at the May 11, 2017 meeting of the committee.

/s/ Richard B. Saphire
Richard B. Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MARCH 9, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 9:39 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Bell, Clyde, Cole, Gilbert, Peterson, and Skindell in attendance. At the invitation of the chair, Representative Jonathan Dever participated as an ex officio non-voting member of the committee.

Approval of Minutes:

The minutes of the February 9, 2017 meeting of the committee were approved, as corrected.

Reports and Recommendations:

Article V, Section 2 (Elections by Ballot)

Chair Saphire began the meeting by recognizing Christopher Gawronski, legal intern, for the purpose of providing a first presentation of a report and recommendation for Article V, Section 2 (Election by Ballot). Chair Saphire explained that, because the report and recommendation was for a change to the section, a second presentation would be required before the committee could vote on whether to issue the report and recommendation.

Mr. Gawronski described the report as indicating the committee's position that Article V, Section 2 be amended to include the word "secret," so the provision would read: "All elections shall be by secret ballot." He continued that the report explains the background of the section, indicating it originated in the 1802 constitution and has never been amended. He said the report and recommendation describes the history of balloting, indicating that the use of the secret,

“Australian,” ballot in the late 19th century was intended to address corrupt practices that included stuffing ballot boxes, engaging in kick-back schemes, and buying votes. Mr. Gawronski stated that the report outlines case law related to the section, specifically a decision by the Supreme Court of Ohio in 1929 holding that the term “ballot” means a voting method that “will insure secrecy.” He said the report further describes the work of the Ohio Constitutional Revision Commission in the 1970s, which, while not recommending a change to Section 2, concluded that a secret ballot is a fundamental principle and a proper matter for the constitution. He said the report also summarizes a presentation by Professor Erik Engstrom of the University of California, Davis, concerning the history of ballots in Ohio, particularly noting that some states have a constitutional provision that says the ballot must be secret, but Ohio has not constitutionalized this requirement. Mr. Gawronski said the report concludes that the committee decided to embed the concept of a secret ballot in the constitution to emphasize the importance of protecting the integrity of the voting process by emphasizing the need for ballots to be secret.

Chair Sapphire asked the committee for any comments or discussion.

Committee member Karla Bell noted a comment by committee member Doug Cole at the last meeting in which she said Mr. Cole questioned whether absentee ballots can truly be deemed secret since information identifying the voter is provided. She asked whether modifying the constitution would unnecessarily draw attention to that issue.

Chair Sapphire expressed that he did not think that would be the case. Noting litigation related to the use of absentee ballots, he said the Ohio Supreme Court has clarified that the principle of secrecy is inherent in the current provision. He said the proposal to add the word “secret” would simply make that explicit by emphasizing the importance of secrecy. He said he is unsure whether a challenge to the absentee ballot system on the basis of the lack of secrecy would be affected by a change to the existing provision.

Mr. Cole said he is not sure he shares that view because, as a litigator, he is familiar with the argument that there must be a purpose to adding a word to an existing provision. He said he can see an argument that absentee ballots are not, by definition, secret in the sense that they are filled out in the voter’s place of residence, and the voter has every opportunity to show the ballot to others before sending it in. He said if there is going to be a constitutional requirement for a “secret” ballot; it could be interpreted as indicating more than simply voters wanted a level of secrecy provided for that was not inherent in the implied secrecy that the court had already found in the term ballot. He noted a concern that, by adding the word “secret,” the committee may be creating an environment in which someone could suggest that absentee ballots are not appropriate.

Ms. Bell said she agrees that the addition of the word suggests there should be a heightened standard.

Senior Policy Advisor Steven H. Steinglass said a key part of the Australian ballot was that ballots would be produced by government and provided to people at the polling place. He said that method took the place of a practice in which different parties provided their own ballots. He said the Australian ballot principle also included the concept of secrecy. He suggested that the

report and recommendation could reflect the committee discussed this issue and put the word secrecy in to codify existing practice. He said the report could indicate that there is no intent to alter current procedures concerning absentee ballots or voters who need assistance in casting a ballot.

Chair Sapphire asked whether Mr. Steinglass believes the current report reflects that idea. Mr. Steinglass said he would review the report but asked whether the phrase “absentee ballot” is included. Mr. Cole said he did not believe the phrase was included.

Ms. Bell suggested including a reference to electronic voting, since this method also could implicate concerns regarding secrecy. She said the report should more emphatically declare that the change would merely incorporate existing law, and is not intended to invalidate any present or future voting methods.

Chair Sapphire said, ultimately, if the recommendation goes on the ballot, its success would depend on how the question was posed to the voters. He asked Mr. Cole if he could comment on how the issue of absentee ballots might be framed up for consideration by the electorate.

Mr. Cole said he is not sure of the purpose of adding “secret” because there has been a fairly strong notion in Ohio law that ballots are secret, and that the need for secret ballots does not preclude the use of absentee ballots.

Senator Mike Skindell commented that there are several levels of secrecy on a ballot. He said one level protects against the government identifying individual voters. He said another level of secrecy involves making sure someone is not voting for someone else. He noted the example of an employer who wants an employee to vote in a certain manner. He said Ohio law prohibits a voter from taking a photograph of the completed ballot in order to share it with others. He said this was in order to stop voters from selling their votes or being coerced to vote in a certain way. He said the committee should examine the broader impact before adding the word “secret.”

Adding to Sen. Skindell’s example, Vice-chair Jeff Jacobson said it might not be an employer who wants to influence a vote; it could also be a union, spouse, or pastor. He said, after considering the issue, he has concluded the recommendation to add the word “secret” is a solution in search of a problem. He said he worries about the potential for unintended consequences.

Chair Sapphire asked committee member Ed Gilbert, who initially proposed adding the word “secret,” to comment on the concerns expressed by other committee members. Mr. Gilbert said his position is that, if the law is that the ballot must be secret, there is no reason why this could not be expressly stated in the constitution. He continued that the recommendation would merely be placing in the constitution a concept that is already accepted under case law. He said, by using an absentee ballot, or by obtaining assistance in voting, a voter is exercising a right to give up secrecy.

Chair Sapphire said the committee has heard two positions that are reasonable. He asked whether committee members would like to vote on whether to add the word “secret” to Section 2.

Representative Kathleen Clyde said she would like to obtain more information and opinion on the question. She said she agrees that there are potential unintended consequences to adding the word “secret.” She said she respects the importance of how the concept has evolved over time to mean a secret ballot. She suggested the committee might hear from an election law expert on the topic, and also could benefit from input from election officials or voting advocates.

Chair Sapphire expressed that having many presentations may result in as many different opinions and may not help resolve the issue.

Mr. Jacobson asserted there is no need for additional testimony, adding that voter advocates have not suggested there is a problem in this area. He said, since current law is settled and it is widely accepted that ballots are secret, there is no need to make a change.

Chair Sapphire expressed that if adding the word “secret” would raise questions, then perhaps it is better to leave the provision as is.

Ms. Bell said she is concerned about what a change would mean to the use of absentee ballots and other alternative forms of ballots in special circumstances.

Mr. Gilbert said past discussion clarified for him that the proposed change would not cause problems. But, he said he agrees that the issue has been discussed sufficiently.

Mr. Cole said he agrees the committee should target constitutional changes to actual or expressed problems.

Mr. Gilbert stressed that the charge of the Commission is to modernize the constitution, so making the constitution match case law and current notions is part of the charge of the committee.

Mr. Gilbert moved that the committee proceed with the issuing the report and recommendation to change Article V, Section 2 to include the word “secret,” and Chair Sapphire seconded the motion. Upon a roll call vote, the committee voted against adding the word “secret,” with Mr. Gilbert and Chair Sapphire being the only members in favor of the motion.

Mr. Jacobson presented a new issue related to secrecy, indicating that concerns have been raised regarding the ability to “hack” election results. He said, currently, Ohio does not have electronic voting via the internet, so there is no chance for such “hacking” to occur. However, he said, there have been suggestions that Ohio could use electronic voting in the future. He said to avoid problems, perhaps the constitution should have a prohibition on online voting in order to ensure a physical record is always kept and results cannot be tampered with.

Chair Sapphire suggested that this would be a new issue on the committee’s already large agenda. He suggested having informal discussion with staff in order to clarify this suggestion for possible incorporation into Section 2. There was consensus on this approach. Therefore, no further action will be taken on Section 2.

Article V, Section 2a (Names on the Ballot)

Chair Sapphire continued to recognize Mr. Gawronski for the purpose of providing a first presentation of a report and recommendation for no change to Article V, Section 2a, relating to names on the ballot.

Mr. Gawronski indicated that the report explains the background of Section 2a, specifically that the provision was proposed by initiative in 1949 and was intended to bar straight-party voting by emphasizing the candidates for office rather than their political parties by using an office-bloc format. He said the report indicates the provision was subsequently amended twice to clarify how rotation of names on ballots is to occur. Mr. Gawronski said the report describes related presentations to the committee by Matthew Damschroder, assistant secretary of state, who described the current procedure for rotating names on Ohio ballots, as well as by Professor Engstrom, who noted that Ohio is the only state to prescribe name rotation on ballots by constitutional provision rather than by statute. Mr. Gawronski said the report and recommendation expresses the committee's conclusion that the current provision allows the necessary flexibility to the General Assembly to provide for name rotation based on the needs of new voting methods and technologies, and that, therefore, the committee recommends no change.

Chair Sapphire said, to his knowledge, the section has not caused problems for the boards of elections. There being no comments or concerns by the committee, Chair Sapphire asked for a motion. Mr. Cole moved for the committee to issue the report and recommendation, and Mr. Jacobson seconded the motion. Upon a roll call vote, the motion passed unanimously.

Discussion:

Chair Sapphire announced that the committee also would be considering Article V, Section 7, relating to primary elections. He noted the section was discussed by the committee at meetings in 2014, at which time there was a consensus relating to the portion of the provision requiring a preferential vote for United States Senators. He said the committee agreed that portion of the provision was rendered superfluous as a result of adoption of the Seventeenth Amendment to the United States Constitution. He asked for committee members' suggestions for modifications or changes to Section 7.

Agreeing with Mr. Gilbert's comment about the committee's role in modernizing the constitution, Mr. Cole suggested the committee consider removing the reference to preferential vote for U.S. Senator.

Chair Sapphire said he concurs with that position.

Rep. Clyde agreed with Mr. Cole and said she first would like to explore the issue before voting to remove the language.

Mr. Jacobson asked Mr. Cole why he wished to explore the issue first.

Mr. Cole said the committee should explore how to accomplish the goal because he is not sure that simply striking those words is the right approach.

Mr. Jacobson said striking the words is the right approach if the committee is trying to get rid of unnecessary language. He said he is not sure a study is needed in order to do that.

Mr. Cole said he would be more comfortable having a proposed draft. He wondered if the change would just be to strike “and provision shall be made by law for a preferential vote for United States senator.”

Mr. Jacobson agreed, indicating there could be a semi-colon in place of the comma that is currently before that phrase.

Mr. Cole said he wonders why the first clause in that sentence, that references “elective state, district, county and municipal offices,” does not include federal offices.

Chair Sapphire said the answer to that question has not been determined. He said the issue with that is whether adding “federal” would be preempted by federal law, and also whether there is a need for that addition.

Mr. Jacobson said, arguably, a congressional seat would be included in the use of the word “district.” He said the practice has been to consider a congressional office as a “district office,” an approach that accommodates dealing with districts that are larger than one county.

Mr. Cole said the reason he suggested the committee consider the issue rather than simply striking language is that it would be important to hear from people who work with that language to see if adding the word “federal” might change something important.

Mr. Jacobson asked whether adding the word “federal” suggests that no one can appear on Ohio’s general presidential election ballot without winning a primary in Ohio. He said there is no current problem identifying that congressional and senatorial primaries belong in this rubric and are treated the same way, but the language relating to a preferential vote is a different concept that is no longer in use.

Mr. Gilbert said he would support having additional information before deciding to remove the language.

Mr. Jacobson suggested that a report and recommendation could be prepared that eliminates the phrase without adding the word “federal.” He said speakers could then appear before the committee to opine whether the word “federal” should be added. He said the report and recommendation could then be amended at the meeting.

Chair Sapphire noted a previous concern he had raised regarding whether part of Section 7 suggests that anyone who wants to run for office can get on the ballot through use of a petition, or whether party candidates must use the primary process. He said the United States Court of Appeals for the Sixth Circuit has ruled that this language means that major political parties and

their candidates get access to the ballot during the primary, while independent candidates and minor political parties largely have access to the ballot through the petition process. He said at this time his conclusion is that it is not necessary to consider a change to Section 7 in relation to that issue.

Chair Saphire then turned to the remaining provisions for the committee's review. He said he would talk with staff and maybe consult with Mr. Jacobson about these sections. He said a remaining issue is what to do about the report and recommendation regarding Article I, Section 6 on slavery. He explained that there is an issue regarding the portion of the provision that allows involuntary servitude "for the punishment of crime."

Rep. Clyde asked whether staff could provide the testimony to the committee by voter advocacy and other groups that might have touched on the issues surrounding Article V, Section 7. Chair Saphire said the discussion on the issue occurred prior to staff and prior to the preparation of minutes, but that he would see if there are references that could be provided to the committee.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 10:48 a.m.

Approval:

The minutes of the March 9, 2017 meeting of the Bill of Rights and Voting Committee were approved at the May 11, 2017 meeting of the committee.

/s/ Richard B. Saphire
Richard B. Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES OF THE BILL OF RIGHTS AND VOTING COMMITTEE

FOR THE MEETING HELD
THURSDAY, MAY 11, 2017

Call to Order:

Chair Richard Saphire called the meeting to order at 11:08 a.m.

Members Present:

A quorum was present with Chair Saphire, Vice-chair Jacobson, and committee members Bell, Clyde, Cole, Dever, Fischer, Gilbert, Peterson, and Skindell in attendance.

Approval of Minutes:

The minutes of the March 9, 2017 meeting of the committee were approved.

Reports and Recommendations:

Article V, Section 2 (Elections by Ballot)

Chair Saphire recognized Christopher Gawronski, legal intern, for the purpose of providing a second presentation of a report and recommendation for Article V, Section 2 (Election by Ballot). Mr. Gawronski described the report as indicating the committee's position that Article V, Section 2 be retained in its present form. He said the report outlines the background of the section as well as presentations and committee discussion related to the provision.

Chair Saphire asked the committee for any comments or discussion and there were none. On motion by committee member Karla Bell, seconded by Senator Bob Peterson, the committee voted unanimously to issue the report and recommendation.

Discussion:

Chair Sapphire indicated his intention to move the full Commission to reconsider the committee's report and recommendation on Article V, Section 6, relating to mental capacity to vote. He said when the matter came up before the full Commission previously, it failed to gain sufficient votes for adoption by the Commission.

Chair Sapphire then asked for discussion on remaining issues assigned to the committee. He noted the early problem the Commission faced of having no staff. He said, as a result of that situation, he said he would review his own files to determine if he has any records that show previous committee consideration of or agreement on some of the remaining issues.

Chair Sapphire reminded the committee of its prior discussion on Article V, Section 7. He said the committee had generally agreed to recommend removing the phrase referencing preferential voting for United States Senators, but the question of how to make the change was unresolved. He added there was additional discussion as to whether "federal" should be added to the list of offices for which primary elections apply. Chair Sapphire said he has discussed these issues with Shari L. O'Neill, interim executive director and counsel, suggesting the possibility of having a report and recommendation for this section. However, he acknowledged the difficulty of developing a report and recommendation due to both staffing constraints and the need to send through a formal recommendation by the end of June. Nevertheless, in order to preserve a record of the committee's sense of the issue, Sapphire said he believes the committee should consider making a formal statement on this issue.

Ms. Bell stressed the importance of documenting as much of the committee's discussions as possible. She said she has no particular preference as to what form that documentation should take.

Committee member Patrick Fischer requested corrections to page four of the status memorandum dated May 11. He asked that, in reference to the topic of privacy the request should be described as coming from more than one committee member, and that the type of privacy to be considered was to have been electronic privacy.

Committee member Ed Gilbert requested an explanation of Chair Sapphire's plan to re-raise the issue of mental capacity to vote under Article V, Section 6. Chair Sapphire said he believes that because of the significant work of the committee on this issue, the Commission should consider the recommendation again. Committee member Doug Cole requested clarification as to whether Chair Sapphire would be acting in his individual capacity as a commissioner rather than as chair of the committee. Chair Sapphire confirmed he would make the request in his individual commissioner capacity.

Chair Sapphire requested any public comment. There was a question about the appropriate procedure for reintroducing the Article V, Section 6 report for Commission consideration. Chair Sapphire indicated he is working on that issue with staff and the Commission co-chairs.

Adjournment:

With no further business to come before the committee, the meeting adjourned at 11:37 a.m.

Approval:

The minutes of the May 11, 2017 meeting of the Bill of Rights and Voting Committee were approved at the June 8, 2017 meeting of the full Commission.

/s/ Richard B. Saphire
Richard B. Saphire, Chair

/s/ Jeff Jacobson
Jeff Jacobson, Vice-chair

Appendix 3

Bill of Rights and Voting Committee

Status of Assigned Constitution Sections

Status of Assigned Constitution Sections

When Commission created its subject matter committees, it charged each committee with the responsibility for reviewing certain assigned sections of the Ohio Constitution. In turn, each committee maintained a planning worksheet to track its progress in addressing each of its assigned sections. The following document is the final planning worksheet for this committee. It indicates all of the sections for which the committee was responsible and the final status of its reports on those sections. The status is based on the approval steps required in the OCMC Rules of Procedure and Conduct.

The status categories indicated on the worksheet are as follows:

| | |
|---------------------------------|--|
| Draft Status | The current status of a draft report & recommendation |
| Committee 1 st Pres. | First presentation to the committee of the draft report & recommendation |
| Committee 2 nd Pres. | Second presentation to the committee |
| Committee Approval | Approval by the committee of the report & recommendation |
| CC Approval | Approval by the Coordinating Committee |
| OCMC 1 st Pres. | First presentation to the Commission |
| OCMC 2 nd Pres. | Second presentation to the Commission |
| OCMC Approved | Adopted by the Commission |

Bill of Rights and Voting Committee

Planning Worksheet (Through June 2017 Meetings)

Preamble

| Preamble | | | | | | | |
|--------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

Article I – Bill of Rights (Select Provisions)

| Sec. 1 – Inalienable Rights (1851) | | | | | | | |
|------------------------------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 2 – Right to alter, reform, or abolish government, and repeal special privileges (1851) | | | | | | | |
|--|------------------------------------|------------------------------------|-----------------------|----------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 12.11.14 | 2.12.15 | 2.12.15 | 3.12.15 | 4.9.15 | 6.11.15 | 6.11.15 |

| Sec. 3 – Right to assemble (1851) | | | | | | | |
|-----------------------------------|---------------------------------|---------------------------------|--------------------|----------------|----------------------------|----------------------------|----------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 12.11.14 | 2.12.15 | 2.12.15 | 3.12.15 | 4.9.15 | 6.11.15 | 6.11.15 |

| Sec. 4 – Bearing arms; standing armies; military powers (1851) | | | | | | | |
|--|---------------------------------|---------------------------------|--------------------|----------------|----------------------------|----------------------------|----------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 12.11.14 | 2.12.15 | 2.12.15 | 3.12.15 | 4.9.15 | 6.11.15 | 6.11.15 |

| Sec. 6 – Slavery and involuntary servitude (1851) | | | | | | | |
|---|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Started | | | | | | | |

| Sec. 7 – Rights of conscience; education; the necessity of religion and knowledge (1851) | | | | | | | |
|--|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 11 – Freedom of speech; of the press; of libels (1851) | | | | | | | |
|---|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 13 – Quartering troops (1851) | | | | | | | |
|------------------------------------|------------------------------------|------------------------------------|-----------------------|---------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 4.9.15 | 6.11.15 | 6.11.15 | 7.9.15 | 9.10.15 | 10.8.15 | 10.8.15 |

| Sec. 17 – No hereditary privileges (1851) | | | | | | | |
|---|------------------------------------|------------------------------------|-----------------------|---------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 4.9.15 | 6.11.15 | 6.11.15 | 7.9.15 | 9.10.15 | 10.8.15 | 10.8.15 |
| | | | | | | | |

| Sec. 18 – Suspension of laws (1851) | | | | | | | |
|-------------------------------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 19 – Eminent domain (1851) | | | | | | | |
|---------------------------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 19b – Protect private property rights in ground water, lakes, and other watercourses (2008) | | | | | | | |
|--|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 20 – Powers reserved to the people (1851) | | | | | | | |
|--|------------------------------------|------------------------------------|-----------------------|-----------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 11.12.15 | N/A | 11.12.15 | 12.10.15 | 12.10.15 | 1.14.16 | 1.14.16 |

| Sec. 21 – Preservation of the freedom to choose health care and health care coverage (2011) | | | | | | | |
|---|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

Article V – Elective Franchise

| Sec. 1 – Qualifications of an Elector (1851, am. 1923, 1957, 1970, 1976, 1977) | | | | | | | |
|--|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 2 – By ballot (1851) | | | | | | | |
|---------------------------|------------------------------------|------------------------------------|-----------------------|----------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 3.9.17 | N/A | 5.11.17 | 5.11.17 | 5.11.17 | N/A | 5.11.17 |

| Sec. 2a – Names of candidates on ballot (1949, am. 1975, 1976) | | | | | | | |
|--|------------------------------------|------------------------------------|-----------------------|---------------|-------------------------------|-------------------------------|------------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 3.9.17 | N/A | 3.9.17 | 3.9.17 | 3.9.17 | N/A | 4.13.17 |

| Sec. 4 – Exclusion from franchise for felony conviction (1851, am. 1976) | | | | | | | |
|--|---------------------------------|---------------------------------|--------------------|-----------------|----------------------------|----------------------------|----------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 11.12.15 | N/A | 11.12.15 | 12.10.15 | 12.10.15 | 1.14.16 | 1.14.16 |

| Sec. 6 – Idiots or insane persons (1851) | | | | | | | |
|--|---------------------------------|---------------------------------|--------------------|----------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Completed | 9.10.15 | 11.12.15 | 3.11.16 | 4.14.16 | 4.14.16 | 5.12.16 | |

| Sec. 7 – Primary elections (1912, am. 1975) | | | | | | | |
|---|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| | | | | | | | |

| Sec. 8 – Term limits for U.S. senators and representatives (1992) | | | | | | | |
|---|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Transferred to Legislative Branch and Executive Branch Committee | | | | | | | |

| Sec. 9 – Eligibility of officeholders (1992) | | | | | | | |
|---|---------------------------------|---------------------------------|--------------------|-------------|----------------------------|----------------------------|---------------|
| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
| Transferred to Legislative Branch and Executive Branch Committee | | | | | | | |

Article XVII – Elections

Sec. 1 – Time for holding elections; terms of office (1905, am. 1954, 1976)

| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
|--------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| | | | | | | | |

Sec. 2 – Filling vacancies in certain elective offices (1905, am. 1947, 1954, 1970, 1976)

| Draft Status | Committee 1 st Pres. | Committee 2 nd Pres. | Committee Approval | CC Approval | OCMC 1 st Pres. | OCMC 2 nd Pres. | OCMC Approved |
|--------------|------------------------------------|------------------------------------|-----------------------|-------------|-------------------------------|-------------------------------|------------------|
| | | | | | | | |